

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 87

JOSEPH GEORGE SHERMAN, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 9, 1957
CERTIORARI GRANTED APRIL 22, 1957

INDEX

PAGE

Statement Under Rule 15(b)	1
Indictment	2
Testimony	5
Motion to Dismiss Indictment	177
Summation for Government	181
Charge of the Court	182
Verdict	194
Judgment	200
Notice of Appeal	201

GOVERNMENT'S WITNESSES

Clifford Melikian:

Direct	12, 22
Preliminary Cross	21
Cross	26
Redirect	33
(Recalled)	
Direct	138, 152, 158, 161, 174
Preliminary Cross	151, 154, 160, 168

Raymond C. Ruduen:

Direct	34
Cross	37

James C. Hunt:

Direct	41
Cross	44

George J. Romig, Jr.:

Direct	57
Preliminary Cross	59

Charles Kalchinian:

Direct	66
Cross	81
Redirect	124
(Recalled)	
Direct	175

Michael J. Reynolds:

Direct	126
Preliminary Cross	128

Cecil E. Nickell:

Direct	130, 132, 134
Preliminary Cross	132, 133, 135

Anthony J. Drago:

Direct	170
Cross	172

	Original	Print
Record from U.S.D.C. for the Southern District of New York	202	202
Stenographer's minutes (Excerpt)	202	202
Opening statement by defense counsel	203	202
Judgment and commitment in United States v. Joseph George Sherman in No. C112-103, dated June 10, 1942, filed June 26, 1942	208	205
Judgment and commitment in United States v. Joseph G. Sherman in No. C124-58, dated February 24, 1947, filed March 13, 1947, including the certification by the Assistant Registrar of the United States Public Service Hospital at Lexington, Kentucky	210	206
Proceedings in U.S.C.A. for the Second Circuit	212	208
Notice of motion of United States Attorney, dated December 28, 1956 in United States v. Joseph George Sherman in No. C137-331	212	208
Affidavit of Malcolm Monroe	213	209
Exhibit A—Opening statement by defense counsel (Copy) (omitted in printing)	214	210
Opinion, Medina, J.	215	210
Judgment	223	217
Clerk's certificate (omitted in printing)	225	217
Order allowing certiorari	227	218

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

—against—

JOSEPH GEORGE SHERMAN,

Appellant.

Statement Under Rule 15(b)

Defendant, Joseph George Sherman was charged in a three-count indictment with Violation of (T. 21 Sec. 173-174 U. S. C.) the receiving, concealing and selling of heroin.

Trial was had before Hon. Thomas F. Murphy, District Judge, and a jury, in the United States District Court for the Southern District of New York on June 4, 5, 6, 1956. Defendant was found guilty on all three counts.

Defendant was sentenced on June 25, 1956 to Ten (10) years on each count in the indictment to run concurrently, fined One (1) Dollar, fine remitted.

Defendant appeals from the sentence.

Henry A. Lowenberg, Esq., represents the defendant.

Hon. Paul W. Williams, United States Attorney for the Southern District of New York appears on behalf of the Government.

2
Indictment

(288)

IN THE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The Grand Jury charges:

1. On or about the 1st day of November, 1951, in the Southern District of New York,

JOSEPH GEORGE SHERMAN,

the defendant, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a certain narcotic drug, to wit, diacetylmorphine hydrochloride, a derivative and preparation of opium, commonly known as heroin, which, together with certain adulterants, weighed approximately 19 grains after said heroin had been imported and brought into the United States contrary to law, knowing that said heroin had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited. (Title 21, Sections 173 and 174, United States Code.)

Indictment

(289)

SECOND COUNT

The Grand Jury further charges:

1. On or about the 7th day of November, 1951, in the Southern District of New York,

JOSEPH GEORGE SHERMAN,

the defendant, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a certain narcotic drug, to wit, diacetyl morphine hydrochloride, a derivative and preparation of opium, commonly known as heroin, which together with certain adulterants, weighed approximately 2 grains, after said heroin had been imported and brought into the United States contrary to law, knowing that said heroin had theretofore been imported and brought into the United States contrary to law, in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code.)

(290)

THIRD COUNT

The Grand Jury further charges:

1. On or about the 16th day of November, 1951, in the Southern District of New York,

JOSEPH GEORGE SHERMAN,

the defendant, unlawfully, wilfully, and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a certain narcotic drug, to wit,

Indictment

diacetyl morphine hydrochloride, a derivative and preparation of opium, commonly known as heroin, which, together with certain adulterants, weighed approximately 1 grains; after said heroin had been imported and brought into the United States contrary to law, knowing that said heroin had theretofore been imported and brought into the United States contrary to law, in that the importation and bringing of any narcotic drug into the United States except such amounts of crude opium and coca leaves as the Commissioner of Narcotics find to be necessary to provide for medical and legitimate uses only, is prohibited

(Title 21, Sections 173 and 174, United States Code.)

MYLES J. LANE,
United States Attorney.

WILLIAM R. WHITE,
Foreman.

Testimony

(1) UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK.

C.137-331

[SAME TITLE]

New York, June 4, 1956,
10:30 A.M.

Before:

HON. THOMAS F. MURPHY,

District Judge.

Appearances:

PAUL W. WILLIAMS, Esq., United States Attorney, for
the Government;

By Malcolm Monroe, Esq., Assistant United States
Attorney.

HENRY A. LOWENBERG, Esq., Attorney for Defendant.

(2) (The following proceedings took place in the robing
room:)

Mr. Lowenberg: First I wanted to renew an application
I had made before Judge McGohey, which had been denied,
for a short adjournment of 48 hours for the following
reasons:

I tried this case in 1942. There was a conviction, and
the Court of appeals unanimously reversed the judgment
of conviction, holding that the evidence of entrapment was
conclusive, but instead of dismissing the indictment they

Application for Adjournment

sent it back for a retrial, as there was an informer who testified in that case by the name of Kalchinian who had made all the arrangements with this defendant, and there was a division of the narcotics between them for their own use without profit. In fact, the Court of Appeals even commented on that.

There was a question in their minds as to whether this constituted a sale.

Yesterday afternoon at three o'clock I received a telephone call at my home from Mr. Monroe who told me that the Government was not going to use the special employee Kalchinian as a witness for the Government. Well, to put it mildly I blew my top as the expression goes, and I explained to him very frankly that the Canon (3) of Ethics of the Bar Association dictated that any evidence can't be withheld and should not be withheld, and that in view of the fact that Kalchinian had been called as a witness by the Government it was incumbent upon the Government to recall him at this time.

I told him that I was going to call it to the Court's attention, and I told him that I was going to request an adjournment.

I stopped rereading the minutes at that point, as your Honor can well understand, and this morning Mr. Monroe said he changed his mind, that he is going to call Kalchinian as a witness.

Now all I ask the Court's indulgence for is 48 hours to complete the reading of the record and refresh my recollection of the data of the trial, the facts of the trial and the evidence of the case, because since then I have tried many, many cases, and I was engaged in that seven-week trial before Judge Palmieri in that tax case on behalf of Bowers and—

The Court: May I interrupt?

Mr. Lowenberg: Yes, Judge.

Application for Adjournment

The Court: Is it fair to assume that the identical application has been made before Judge McGohey?

Mr. Lowenberg: Before Judge McGohey, yes.

(4) The Court: And that was denied?

Mr. Lowenberg: And that was denied.

The Court: I will deny it at this time.

Mr. Lowenberg: May I ask your Honor's indulgence after the selection of the jury that it be adjourned until tomorrow to give me this afternoon and this evening to look over the prior record?

The Court: Well, let me ask the Government, how long will you be on your case, Mr. Monroe?

Mr. Monroe: Well, calling Kalchinian I would say a day and a half, your Honor.

The Court: On your case?

Mr. Monroe: That is right, sir.

The Court: How many witnesses will you have other than him?

Mr. Monroe: Two agents—three agents and the chemist.

The Court: Did you propose to call the agents first and then the chemist?

Mr. Monroe: That is right.

The Court: And Kalchinian last?

Mr. Monroe: Yes, sir.

The Court: Well, is their testimony so important; that is, the agents' testimony and the chemist, (5) that you need to read over the testimony today?

Mr. Lowenberg: Except this, Judge, that I am tied up here until four o'clock, and you know what it is running in office, and I don't have to tell your Honor about that, because there are a number of calls and—

The Court: Let us do this if we are agreeable: We will pick a jury and continue until lunch time and then adjourn.

Mr. Lowenberg: That is perfectly all right.

Colloquy

I want to submit to your Honor an opinion of the Court of Appeals in this case.

There is one other situation in this case, Judge, and that is that Mr. Monroe advised me that as part of the Government's case he was going to establish the criminal record of this defendant.

I said I would vigorously object and he said—rather I said that I wanted to hold a conference before the Court and before any of the jurors was brought into the courtroom so we do not engage in any argument in front of the jury.

I do not see how that is possible without the defendant taking the witness stand and without the defendant offering any evidence of good character, which (6) I do not intend to do.

The Court: Well, I do not like to make any advance rulings on evidence.

Mr. Monroe: I have briefed the point on that and I would like to hand up to your Honor a memorandum.

The Court: Well, what is your theory of the proof required in this case?

Mr. Monroe: In both the Sorells case and in this case in the Court of Appeals the courts indicated that where a defense of entrapment is raised the defendant's predisposition to commit the crime is relevant, and to show that predisposition the Government can go outside the period of the indictment and can show a predisposition.

For instance, in the Sorrells case the concurring Justices who felt that entrapment once established was conclusive, yet the minority took exception to the majority opinion in that the entrapment while once established nevertheless is rebuttable, and the Government can show the predisposition of the defendant. The concurring Justices said that the record of the prior convictions could be used in

Colloquy

that situation, and that was one of the reasons they were against the rule.

They further said that where intent is a special (7) issue in the case that a record of prior convictions can be introduced, and I think that in the situation where entrapment is raised it makes intent a special issue of that nature because it makes the defendant's predisposition to commit the crime of relevancy, and certainly predisposition is a matter of special intent or special character on intent.

Mr. Lowenberg: I might say to your Honor this:

That a conviction had seven years back certainly would not show a predisposition on the part of an accused to commit a crime charged seven years later.

Now I submit, if your Honor pleases, that what Mr. Monroe has referred to is the minority view of the court and not the majority views of the court in that Sorells case, because there they held that it was—the burden was upon the accused to establish that he was induced into committing the crime, entrapped into committing the crime, that the burden rested upon him; in fact, the Court of Appeals has said so in this very case, in these cases, although they said the evidence on that was conclusive.

Now, prior convictions certainly cannot show a predisposition to commit this crime seven years back, and I say the only way they could establish that would be (8) through other actual sales of narcotics within the limits of this indictment and in no other way.

The Court: Well, as I said, I will not make any advance rulings, and I propose that you say nothing about it in your openings, and I assume that the agents will not say anything about it at least until tomorrow with regard to whether if we are going to adjourn at noon time.

Mr. Monree: Your Honor, there is one other aspect of the evidence in this case.

Colloquy

The actual narcotics have been destroyed in the routine handling of contraband material. The Government proposes to establish the narcotics by documentary evidence, reports maintained by the Bureau of Narcotics in the regular course of business.

Mr. Lowenberg: I am going to object to that, of course, Judge, because I submit that the actual narcotics have got to be produced in the courtroom and not by any documents that may have been prepared by some clerk or some agent.

The Court: Well, as I said, I won't make any advance rulings.

Mr. Monroe: Pardon me, Judge, but there is another case which has been assigned to your Honor to (9) follow this case, and one of the attorneys is outside and has a suggestion to make with respect to that.

The Court: Very well.

(At this point the conference between Court and counsel ended in the robing room and the following proceedings took place in open court:)

The Clerk: United States of America vs. Joseph George Sherman.

Is the Government ready?

Mr. Monroe: The Government is ready.

The Clerk: Defendant ready?

Mr. Lowenberg: The defendant is ready.

The Clerk: Both sides ready, your Honor.

The Court: May I have the indictment?

The Clerk: Yes, sir (handing to Court).

(At this point the jury panel was sworn.)

(The selection of a jury then followed.)

Colloquy

The Court: Is the jury satisfactory to both sides?

Mr. Lowenberg: Satisfactory to the defendant.

Mr. Monroe: Satisfactory to the Government.

(The jury was duly impaneled and sworn.)

Mr. Lowenberg: Judge, before the U. S. Attorney proceeds with his opening, may I ask your Honor (10) that if there are any Government witnesses in the courtroom that they be excluded?

The Court: Yes.

The Clerk: Any prospective witnesses will please withdraw from the courtroom and retire to the witness room in the back of the courtroom.

Mr. Monroe: If your Honor pleases, Mr. Melikian will assist me and probably be called as the first witness on behalf of the Government.

The Court: Any objection?

Mr. Lowenberg: No objection to that.

The Court: All right, Mr. Monroe.

(Mr. Monroe thereupon made an opening address to the jury on behalf of the Government.)

(Mr. Lowenberg thereupon made an opening address to the jury on behalf of the defendant.)

The Court: Call your witness.

Mr. Monroe: Mr. Melikian.

Clifford Melikian—for Government—Direct

CLIFFORD MELIKIAN, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Monroe:

Q. Mr. Melikian, by whom are you employed? (11) A. by the U. S. Treasury Department, the Bureau of Narcotics.

Q. And what is your capacity in that employment, sir?

A. Narcotic agent.

Q. For how long have you been so employed? A. Approximately six years.

Q. Were you so employed in October and November of 1951? A. I was.

Q. Would you state what you did on November 1, 1951, in the course of this employment? A. On November 1, 1951, at about 11 A.M. in the morning agent Hunt and I met special employee Kalchinian in the vicinity of 46th Street and Eighth Avenue.

Kalchinian got into the government vehicle and he said that he would be able to purchase narcotics from—

Mr. Lowenberg: I object to that, what he said.

The Court: Sustained.

Just tell us what you did, Mr. Melikian.

The Witness: Well, Kalchinian, he got into the government vehicle and agent Hunt searched the person of Kalchinian and found no narcotics on him.

I gave Kalchinian \$15 of government advance funds.

(12) We then drove to the vicinity of 24th Street and Eighth Avenue. Kalchinian left the government vehicle.

Agent Hunt and I got out and followed him to the

Clifford Melikian—for Government—Direct

vicinity of 20th Street and Eighth Avenue and he stood—we met and stood standing on the corner there, and at about 12:20, 12:15 or thereabouts, I observed the defendant Joseph Sherman meet Kalchinian.

Q. Mr. Melikian, do you see the person whom you observed meet Kalchinian in court? A. Yes, I do.

Q. Will you point him out, please? A. Yes, he is the gentleman to the left of Mr. Lowenberg in the brown suit.

Mr. Monroe: May the record show that the witness has indicated the defendant Joseph George Sherman?

Q. What happened after you saw the defendant meet Kalchinian? A. The two of them walked on the south side of 20th Street in an easterly direction towards Seventh Avenue, and in the vicinity of about 208 West 20th Street I observed the defendant Sherman hand something to Kalchinian, Kalchinian taking it, and then handing something to Sherman.

(13) And at the same time Kalchinian was carrying a newspaper in his hand and he placed this newspaper in his pocket, denoting that he had received something, and Kalchinian immediately after receiving handing something, and Sherman took a few more steps. Veered to his left, cut across the street, and returned to 24th Street and Eighth Avenue.

I followed him with agent Hunt. We got to the vehicle, met Kalchinian, and he gave me an empty Pall Mall package, and inside that package I found a glassine envelope containing a white substance.

We took the package and all of us, agent Hunt, Kalchinian, and myself initialed the glassine envelope, and

Clifford Melikian—for Government—Direct

agent Hunt again searched the person of Kalchinian and he found no narcotics on him.

Mr. Lowenberg: I did not hear that. What was that?

The Witness: I said he again searched his person and found no narcotics on him.

Q. Mr. Melikian, would you now describe the activities that you took part in as a narcotic agent on November 7, 1951? A. On that day at about noon time agent Hunt, Coyle and I met Kalchinian in the vicinity of 59th Street (14) and Seventh Avenue.

He got into the government car—Kalchinian got into the government car and agent Hunt searched his person and found no narcotics on him, and I gave him \$15 of government advance funds.

We then proceeded in the government vehicle to the vicinity of 21st Street and Ninth Avenue. Kalchinian got out of the car, as did agent Hunt following myself, and we followed him to the vicinity of 20th Street and Eighth Avenue again.

At about 1:20 P.M. or 1:30, thereabouts, Sherman was observed to come and meet Kalchinian on the corner, and the two of them walked north on Eighth Avenue to 21st Street, and then they turned right into 21st Street and walked in an easterly direction to Seventh Avenue.

They stopped at Seventh Avenue and momentarily they appeared to be in conversation.

I then observed Sherman, the defendant Sherman, hand something to Kalchinian, Kalchinian taking it, and handing something to him, and placing the newspaper in his coat pocket, and then the two of them continued walking south on Seventh Avenue to 20th Street.

Kalchinian turned right, as did Sherman, both (15) of

~~Clifford Melikian~~ for Government—Direct

them turned together, walked very slowly in a westward direction on 20th Street.

Then Sherman shortly after turning into the block cut across to the south side of the street and he went into the building, 240 West 20th Street.

Agent Hunt and I maintained observation on the premises and in about ten minutes he emerged from the building, and we then followed him to 264 West 17th Street.

After he had entered that building we then left and went back to the vicinity of 21st Street and Ninth Avenue, and agent Coyle was there with Kalchinian.

Agent Coyle gave me an empty Pall Mall cigarette package, and on the inside of it there was a glassine envelope with a white substance. All of us initialed the package.

Q. Mr. Melikian, will you now describe your activities as a narcotic agent on November 16th, sir? A. On November 16, 1951, agent Rudden and I met—

The Court: Agent who?

The Witness: Agent Rudden, your Honor.

The Court: Yes.

The Witness: Agent Rudden and I met Kalchinian in the vicinity of 23rd Street and Eighth Avenue. This (16) was about 11 A.M. in the morning.

Kalchinian was—before Kalchinian arrived I copied down the serial numbers of a \$10 bill and a \$5 bill on a piece of paper from a tablet.

In the presence of agent Rudden when Kalchinian arrived, agent Rudden searched his person and found no narcotics on him, and I provided him with \$15 of advance funds, and Kalchinian then proceeded to 21st Street and Eighth Avenue.

Q. Agent Melikian, this \$15 that you handed to Kalchinian on the 16th, was that the same money that you

Clifford Melikian—for Government—Direct

had noted the numbers of on the cigarette paper? A. Yes, sir, it was. It was the same money.

Q. Continue. A. Sherman met Kalchinian on 21st Street and Eighth Avenue and then the two of them walked west on 21st Street and Ninth Avenue, south on Ninth Avenue to 19th Street, and when they got to 19th Street the two of them turned left on 19th Street and started walking east:

Well, just a little way past the corner I observed Sherman hand something to Kalchinian, Kalchinian taking it and handing something to Sherman, and also placing a newspaper in his pocket—Kalchinian is the one who (17) placed the newspaper in his pocket.

The two of them continued walking eastward to Eighth Avenue. Kalchinian turned left on Eighth Avenue and started walking north. Sherman turned right and walked south.

I followed Sherman. I followed him to 264 West 17th Street. I stayed there until agent Rudden joined me about 15 minutes later, or possibly half an hour, I don't recall.

When he joined me at that point we were admitted to the—to this address by Sherman and we placed him under arrest, and in the course of searching his person I found the same bills, the \$10 bill and the \$5 bill that I had listed the serial numbers of, on his person.

Mr. Monroe: Will you mark this Exhibit 1 for identification, please?

(Marked Government Exhibit 1 for identification.)

A. (Continuing) When I took the money Sherman made some sort of remark. I don't remember exactly his words, but it was something to the effect that this was a rather

Clifford Melikian—for Government—Direct

obvious thing on my part to do, because as a result of taking that money from him he knew who was responsible for his apprehension.

Mr. Lowenberg: I did not hear that at all.

(18) The Court: Will you please repeat that, Mr. Reporter?

(Latter part of answer read.)

Q. Mr. Melikian, I show you Government Exhibit 1 for identification, and I ask you if you ever saw that before?

A. Yes. This is the piece of paper from the tablet that I testified about copying the serial numbers of the \$10 bill and the \$5 bill in the presence of agent Rudden. I have my signature down here (indicating).

Q. And this is the same \$10 and \$5 bill which you found on the defendant Sherman at the time of his arrest? A. The serial number listed on that, yes, sir.

Mr. Monroe: Your Honor, the Government offers Government Exhibit 1 for identification in evidence.

The Court: Any objection?

Mr. Lowenberg: Yes.

The Court: The grounds?

Mr. Lowenberg: On the ground that there is considerable writing on that sheet of paper which has nothing to do with this agent's testimony.

The Court: What is the other writing, Mr. Monroe?

(19) Mr. Lowenberg: Pardon me, Judge?

The Court: What is all the other writing?

Mr. Lowenberg: There is writing on the side there, Judge.

The Court: I see it, but I am asking the question of Mr. Monroe.

Clifford Melikian—for Government—Direct

Mr. Lowenberg: Oh, I beg your pardon.

The Court: I am asking him what he wants the other writing in that for?

Mr. Monroe: The other writing is simply the agent's memorandum as to all the—

The Court: I will admit the memorandum with the numbers of the notes involved.

Mr. Lowenberg: Exception.

The Court: Just with the numbers.

Mr. Lowenberg: Exception, Judge.

The Court: You understand how I have ruled?

Mr. Lowenberg: Yes.

The Court: There is admitted that part of the memorandum containing only the serial numbers of the two bills.

Mr. Lowenberg: I know, Judge, but admitting it as such enables the whole document to be in evidence.

The Court: No, it is not. I said I am (20) admitting only the part that contains the serial numbers of the bills. You can cut out or obliterate the rest, or do whatever you want, but that is the only part that the jury can see.

(Government Exhibit 1 for identification received in evidence.)

By Mr. Monroe:

Q. Going back to November 1st, agent Melikian, you testified that you received from agent Hunt a package containing a glassine envelope, containing a white substance. What did you do with that? A. If I remember, Mr. Monroe, I did not receive the package from Mr. Hunt; I received it from special employee Kalchinian.

Clifford Melikian—for Government—Direct

Q. Pardon me? A. I retained custody of that package until agent Hunt and I got to the office of the Bureau of Narcotics at 90 Church Street, weighed the contents, but before weighing the contents I conducted a field test of the contents in the package, which resulted in a positive reaction, and then I weighed the contents and placed the contents into a locked, sealed envelope in the presence of agent Hunt.

Mr. Monroe: Government Exhibit 2-A for (21) identification.

(Marked Government Exhibit 2-A for identification.)

Q. Was that envelope thereafter delivered to the government laboratory? A. Yes.

Q. Agent Melikian I show you Government Exhibit 2-A for identification and I ask you what that is? A. This is an official form 117.

Whenever the purchase was—

Mr. Lowenberg: I object to any explanation as to something not in evidence, your Honor.

The Witness: This is the form that—

Mr. Lowenberg: Just one moment.

The Court: You may describe what it is.

Mr. Lowenberg: Objection.

The Court: Objection overruled. You may have an exception.

The Witness: This is the form that I made at the time of the—when I weighed the contents in the glassine envelope I made this and made notations as to—from where the contents were obtained and so forth.

Clifford Melikian—for Government—Direct

°This is an official record of our files.

Mr. Lowenberg: I move to strike that out, (22) if your Honor pleases, all the volunteered statements on the part of this witness, such as it is an official record.

The Court: Denied.

Mr. Lowenberg: Exception.

Q. You testified, agent Melikian, that this is a record of the Federal Bureau of Narcotics. A. Yes.

Q. Maintained by it in the regular course of its business? A. That is right, sir.

Mr. Monroe: If your Honor please, I offer this in evidence (handing to Mr. Lowenberg).

Mr. Lowenberg: Objected to, if your Honor pleases.

The Court: On what ground?

Mr. Lowenberg: On the ground that a proper foundation has not been laid for it, and on the further ground that there is contained therein certain notations which do not belong there.

The Court: You say it is the regular practice of your department to make out these reports?

The Witness: Yes, your Honor.

The Court: This form?

(23) The Witness: Yes, your Honor.

The Court: And it is the practice to keep them too?

The Witness: Yes, sir.

The Court: And you do that in each case when you receive a package suspected of being narcotics?

The Witness: Yes.

The Court: And you make it out after you weigh it?

Clifford Melikian—for Government—Preliminary Cross

The Witness: That is right, sir.

The Court: And it is part of a government record?

The Witness: Yes.

The Court: I will receive it.

Mr. Lowenberg: May I ask one or two questions on the voir dire, Judge?

The Court: Yes.

Preliminary Cross Examination by Mr. Lowenberg:

Q. Do you know or did you have possession of this document up to day? A. Pardon, sir?

Q. Did you have possession of this document up to today? A. No, sir, I did not. It is part of the file.

(24) Q. Who had possession of it, do you know? A. It was kept in the file room at the Bureau of Narcotics.

Q. And who has charge of that file room? A. The person assigned to it, a clerk by the name of Schwartz.

Q. Schwartz? A. That is right.

Q. And who gave you that piece of paper? A. I took it out of the file myself.

Q. You took it out? A. Yes, sir.

Q. When did you take it out? A. I took it out this morning.

Q. This morning? A. Yes, sir.

Q. When had you seen it before then? A. I seen it last week.

Q. Last week? A. Yes, sir.

Q. When before that? A. I had not seen it for quite some time.

Q. When you say "quite some time" how much time? A. Oh, since 1942.

(25) Q. Since 1942? A. That is right.

Q. You had not seen it? A. Yes.

Clifford Melikian—for Government—Direct

Q. Did you dictate that report, sir?

The Court: Did you say '42?

-The Witness: 1952, I am sorry, sir, '52.

Q. Did you type up that record, sir? A. Yes, sir, I did.

Q. Are you certain of that? A. I am positive.

Q. Is there anything on that to indicate that you had typed it up? A. My signature?

Q. Your signature? A. Yes.

Q. Could it have been typed and your signature put on afterwards? A. No, sir.

Mr. Lowenberg: That is all.

The Court: I will receive it.

(Government Exhibit 2-A for identification received in evidence.)

(26) *By Mr. Monroe:*

Q. Agent Melikian, I show you this Government Exhibit 2-A for identification, and ask you if that shows the receipt by the United States Government chemist—

The Court: It is in evidence. Show it to the jury. Wave it to them, or do anything that you want.

The Witness: I am sorry, Mr. Monroe, but would you mind repeating your question?

Q. I was going to ask you if it contains the receipt by United States chemist?

Mr. Lowenberg: I object to that. It speaks for itself.

Clifford Melikian—for Government—Direct

The Court: I suggested that myself.

Mr. Monroe: I withdraw the question, if your Honor pleases.

Q. Agent Melikian, with respect to the activities which you have described on November 7, 1951, would you state what you did with the package that you received at that time? A. I retained custody of it, and on the same day in the office of the Bureau of Narcotics I field tested it. I then weighed the contents in the package and placed it in a locked, sealed envelope in the presence of agent Hunt.

(27) Mr. Monroe: Government Exhibit 3-A for identification.

(Marked Government Exhibit 3-A for identification.)

Q. Agent Melikian, I show you Government Exhibit 3-A for identification and I ask you what that is, sir? A. This is the Form 117, just like the other form that I examined a few minutes ago.

Q. Is that a document kept by your office in the regular course of business? A. Yes, sir, and prepared by me.

Q. That is, with respect to the transaction on November 7th, is that correct? A. That is correct, sir.

(Mr. Monroe hands document to Mr. Lowenberg.)

Mr. Lowenberg: Are you offering this in evidence?

Mr. Monroe: Yes.

Mr. Lowenberg: I make the same objection, if your Honor pleases.

The Court: Same ruling.

Mr. Monroe: At this time, if your Honor pleases.

Clifford Melikian—for Government—Direct

the Government offers 3-A for identification in evidence.

(28) The Court: Received.

(Government Exhibit 3-A for identification received in evidence.)

Q. With respect to the transaction you have described on November 16th, agent Melikian, would you state what you did with the package that you received on that date?

The Court: I don't think the witness testified that he received any package. Am I correct? Did you testify to that?

The Witness: No, I did not, sir.

The Court: Objection sustained. All right.

Q. Following the arrest of defendant Sherman on the 16th, Mr. Melikian, what transpired thereafter? A. We went to the office of the Bureau of Narcotics with the defendant Sherman and when we were at the office of the Bureau of Narcotics agent Rudden gave me a Chesterfield package that had a glassine envelope in it already, and with two other initials, and I placed my initials on it at that time at the office.

Q. What did you do with that package, sir? A. At a later date—I am almost certain that on the 16th that I field tested it. However, on a later date I weighed it and placed it in a locked, sealed (29) envelope in the presence of agent Rudden.

Q. And did you prepare a further Form 117 with respect to that purchase, sir?

Mr. Monroe: 4-A for identification.

Clifford Melikian—for Government—Direct

Q. Will you answer the question? A. I would like to see the form.

(Marked Government Exhibit 4-A for identification.)

Q. Agent Melikian, I show you Government Exhibit 4-A for identification, and I ask you what that is, please? A. This is the Form 117 that I prepared on November 19, 1951.

Q. And is that document a record maintained by your Bureau in the regular course of its business? A. It is, sir.

(Mr. Monroe hands document to Mr. Lowenberg.)

Mr. Lowenberg: Are you offering this?

Mr. Monroe: Yes, sir.

Mr. Lowenberg: Same objection, Judge.

The Court: The arrest was on November 16th?

The Witness: Yes, sir.

The Court: And you prepared this on November 19th?

The Witness: That is correct.

(30) The Court: In whose possession was the package from the 16th to the 19th?

The Witness: I put in a steel cabinet in the office, your Honor.

The Court: On what date?

The Witness: On the 16th.

The Court: And then removed it on the 19th?

The Witness: That is right, sir. It was over a weekend.

The Court: And then you weighed it and field tested it on the 19th?

Clifford Melikian—for Government—Cross

The Witness: I think I field tested it on the 16th. I am almost sure I did.

Mr. Lowenberg: I move to strike out what he thinks, Judge.

The Court: I will allow it. I will receive it.

(Government Exhibit 4-A for identification received in evidence.)

Mr. Monroe: You may examine.

Cross Examination by Mr. Lowenberg:

Q. Mr. Melikian, how long have you known Mr. Kalchinian, the informer in this case? A. I have known him since—oh, I would say (31) some time in 1951.

Q. 1951? A. Yes.

Q. Well, let me ask you this: These events took place in November, 1951. How long before then did you meet him for the first time? A. For the first time I met him on one occasion during the summer of 1951, and then it was not until some time again later that fall that I saw him again.

Q. And when you saw him in the summer of 1951 he was under arrest for the sale of narcotics, or the possession of narcotics, wasn't he, Mr. Kalchinian? A. I think so.

Q. Pardon me? A. I think so.

Q. You know it to be so, don't you, Mr. Melikian? A. I think so. At the time I didn't know anything about the particular case.

Q. Well, as a matter of fact, didn't Kalchinian after being arrested discuss with you and the other agents that he would like to work with you and the other agents in consideration of getting a suspended sentence in the court? A. Well, I wouldn't know anything about that (32) because—

Clifford Melikian—for Government—Cross

The Court: No, the answer is either yes or no as I look at it.

The Witness: All right, sir. Would you mind repeating that question?

The Court: The question was didn't he say in substance to you that he would like to work for the Bureau of Narcotics so that the court would give him a suspended sentence?

The Witness: No, sir.

The Court: Thank you.

By Mr. Lowenberg:

Q. Well, had you heard anything about that? A. No, sir.

Q. As a matter of fact, didn't you impart information to the United States Attorney's office that he was working with your Bureau, and the United States Attorney requested of the court a suspended sentence for Kalchinian? A. This is at a later date.

Q. That is right. So that you knew, did you not, that he was to be active with your Bureau in consideration of your Bureau and the United States Attorney's office helping him? (33) A. Yes, sir.

Q. That is true, is it not? A. Yes, sir.

Q. Now, by helping you it would mean going out and finding people that he could induce to sell narcotics, isn't that true?

Mr. Monroe: I object to the question, your Honor.

The Court: I will allow it.

Q. Isn't that true? A. Not to induce, Mr. Lowenberg.

Q. When you say "Not to induce" do you know all of Kalchinian's activities? A. No, sir.

Q. Do you know in this case how he happened to handle

Clifford Melikian—for Government—Cross.

any of the narcotics that you say he was handling? A. Oh, I did not tell—

Q. I asked you one question. The question is do you know? A. No, sir.

Q. Do you know? A. No, sir.

Q. So that it was entirely up to Kalchinian, wasn't it, as to how he was going to produce the next (34) victim for you? A. No, sir.

Q. Well, you were not present at any conversation had between Kalchinian and this defendant, were you? A. No, I was not present.

Q. You were not present in Dr. Grossman's office when Kalchinian met this defendant? A. No, I was not.

Q. So you don't know what went on at all between them? A. No, I did not.

Q. All you know is that you saw a so-called package or envelope handed by Sherman to Kalchinian? A. That is correct, sir.

Q. Now, did he receive instructions from you to go out and make cases, yes or no? A. No, sir.

Q. Did he receive instructions from you that cooperating with the Bureau meant if he didn't want to go to jail to go out and try and buy narcotics? A. No, sir.

Q. You gave him no instructions at all? A. Not along those lines, sir.

Q. Did you give him any instructions? (35) A. As pertaining to the specific case that we were working on with Sherman, yes, sir.

Q. And did you give him instructions as to any other cases? A. I think on one occasion at a later date I did.

The Court: The answer calls for either yes or no.

The Witness: Yes, I did. I am sorry.

Clifford Melikian—for Government—Cross

Q. How many cases in all did Mr. Kalchinian produce for the Federal Bureau of Narcotics— A. To my knowledge—

Q. —since he started to work for them? A. To my knowledge about two.

Q. Only two? A. That is all I know, sir.

Q. That is all you know? A. Yes.

Q. Is that right? A. Yes.

Q. Is he still with the Bureau of Narcotics? A. No, sir.

Q. And when did he leave the Bureau of Narcotics?

A. Well, he was never with the Bureau of Narcotics.

Q. You know what I mean, don't you, Mr. Melikian?

(36) A. Well, the last time that I was in touch with Kalchinian was some time in 1952.

Q. I see. And at that time he was paying off his debt to you, to the Federal Bureau of Narcotics? A. Well, if you want to call it a debt.

Q. Now, do you know whether Kalchinian on his own account would induce anybody to sell narcotics? A. I don't know, sir.

Q. That you don't know? A. No.

Q. Now, the defendant told you at the time of his arrest that he was operating a rooming housing at 264 West 17th Street, did he not? A. Yes, sir.

Q. And you did not find out anything to the contrary, did you? A. No, I did not.

Q. And, as far as you know, his income was derived from that rooming house, is that correct? A. I suppose so.

The Court: The question was as far as you know.

The Witness: I don't know.

Q. But you know that he was operating a rooming house? (37) A. According to him, yes, sir.

Clifford Melikian—for Government—Cross

Q. Well, did you find out anything to the contrary? A. No.

Q. Did you search for narcotics in that rooming house?

A. There was a search conducted on Sherman in the immediate room where he was arrested.

Q. Pardon me? A. There was a search conducted, yes, sir.

Q. Of the premises, too? A. Not of the entire premises, no, sir.

Q. Are you sure of that now? A. I am almost sure. I can't recall. It has been some time ago.

Q. Now, there were no narcotics found in the premises? A. No, sir.

Q. Isn't that true? A. That is true.

Q. Is that right? A. That is correct.

Q. Did I understand you to testify that you did not know that Kalchinian had met this defendant at Dr. Grossman's office? (38) A. I don't know that I testified to that.

Q. Well, may I refresh your recollection? I want to ask you—

Mr. Lowenberg: This question is at page 75 of the record.

Q. —do you remember having been asked this question and didn't you give the following answer at the previous trial—

Mr. Monroe: If your Honor pleases, I think a foundation should be laid for this.

The Court: Sustained, yes.

Mr. Lowenberg: Exception.

Q. Well, do you remember having testified in the previous trial? A. Yes, sir.

Clifford Melikian—for Government—Cross

Q. Do you remember having testified there as to how Kalchinian met this defendant? A. I don't recall, sir.

Q. Well, may I refresh your recollection?

The Court: Show it to him.

Q. Does this refresh your recollection (Mr. Lowenberg standing next to witness at witness stand and exhibiting transcript)? A. Yes, sir.

(39) Q. It does? A. Yes.

The Court: What is your answer?

The Witness: Yes.

Q. In other words, having your recollection refreshed now—

Mr. Monroe: What page?

Mr. Lowenberg: 75.

Q. You were told that Kalchinian had met this defendant at Dr. Grossman's office? A. Yes, sir.

Q. And you knew that this defendant was there for a cure of the narcotics? A. That I didn't know, sir.

Q. That you didn't know? A. No.

Q. You were not told that? A. I don't remember if I was.

Q. Well, may I try to refresh your recollection again here on page 75 (indicating)? A. Will you find it?

Q. Right here (indicating). A. Yes, I said that, that he met the defendant at Dr. Grossman's office.

(40) Q. And did you also say in answer to the question that the defendant told you he was there for a cure? A. For a cure?

Q. Yes. A. I don't recall the defendant telling me that he was there for a cure.

Clifford Melikian—for Government—Cross

Q. May I again—

The Court: Now, before you ask this witness any further questions like that please refer to the record and read the questions and answers that you have in mind.

Mr. Lowenberg: Yes.

Q. Do you remember having been asked this question: "Q. And did he tell you he was there in Dr. Grossman's office for a cure, this defendant? A. Yes, sir. He told me he met him at Dr. Grossman's office."

Now, does that refresh your recollection? A. Well, that is the answer that I know, that I didn't know the defendant was there for a cure; I knew that Kalchinian met him at the doctor's office.

Q. Do you know if that doctor has a practice of curing addicts?

The Court: Curing addicts?

Q. Or attempting to cure addicts. (41) A. I understand, Mr. Lowenberg, he had the practice of attempting to cure addicts.

Mr. Lowenberg: Will your Honor bear with me for a moment?

Q. I will ask you to look at this question and answer and see whether it refreshes your recollection as to whether the defendant did not tell you he was running a rooming house?

Mr. Lowenberg: And if I might indicate this is what I intend to read and to refer to.

The Court: There is no dispute. The witness says

Clifford Melikian—for Government—Redirect

the man told him he was running a rooming house, and he has found nothing to the contrary, is that true?

The Witness: That is correct, your Honor.

Mr. Lowenberg: All right.

Q. Now, before Kalchinian met the defendant for the first time, that is, with respect to the delivery of any envelopes, was Kalchinian down to the Federal Bureau of Narcotics to see you? A. He was down at the Federal Bureau of Narcotics, and he did see me.

Q. And he did see you? A. Yes, sir.

Q. He did? (42) A. Yes, sir.

Q. Did he tell you he knew of the possibility of producing another case for you? A. He told me that he would be able to make a buy from someone, yes, sir.

Q. That he would be able to make a buy? A. Yes, sir.

Q. You were not interested, were you, as to how that buy was going to be made as long as the buy was made? A. That is in substance correct.

Q. Pardon me? A. That is in substance correct.

Q. That is all you were concerned about as an agent, is that right? A. Not entirely.

Q. Is that correct? A. Well, not entirely, sir.

Q. Well, that is all that interested you? A. Yes, sir.

Mr. Lowenberg: I have no further questions.

The Court: Any redirect?

Mr. Monroe: Yes, sir.

(43) Redirect Examination by Mr. Monroe:

Q. Mr. Melikian, you testified that at the time of his arrest the defendant told you that he made his living by running a rooming house? A. Yes, sir.

Raymond C. Rudden—for Government—Direct

Q. And you further testified that you learned something which ran contrary to that? A. That is correct, sir.

Q. However, upon searching him you did find in the defendant's possession the currency which you had given to Kalchinian—

The Court: You have already covered that.

Mr. Lowenberg: Objected to as having already been asked and answered.

The Court: I already made my ruling before you arose.

Mr. Lowenberg: I am sorry, Judge. I did not hear it.

Mr. Monroe: I have no further questions.

Mr. Lowenberg: No further questions.

The Court: Next witness.

(Witness excused.)

(44) RAYMOND C. RUDDEN, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Monroe:

Q. Mr. Rudden, what is your occupation? A. I am a Treasury agent connected with the Bureau of Narcotics, sir.

Q. How long have you been such agent? A. Approximately five years, sir.

Q. Were you engaged as such agent in October and November, 1951? A. Yes, sir.

Q. Were you on duty as such agent on November 16, 1951? A. Yes, sir.

Raymond C. Rudden—for Government—Direct

Q. Will you describe your activities on that day, sir?

A. On November 16, 1951, at about 11 A.M. in the morning I met agent Melikian at the vicinity of 23rd Street and Eighth Avenue.

Agent Melikian and I went into the Whalen drug store located on the northwest corner. Agent Melikian noted two bills, a \$10 bill and a \$5 bill.

Melikian and I left the drug store and met special (45) employee Ballow at the immediate vicinity.

Q. You refer to this special employee as Ballow? A. Yes.

Q. Do you know his true name? A. I believe—I am not sure, but I believe his name is Charles Kalchinian, something like that. I really don't know his name, sir.

Q. Thank you. Will you continue? A. Special employee Ballow—

Q. Will you refer to him by his true name if you will, please? A. Kalchinian, some name like that.

Q. Yes. A. Kalchinian, agent Melikian and I went to the government vehicle that was parked on the east side of Eighth Avenue between 23rd and 24th Street.

In the government vehicle I searched special employee Kalchinian. I found no narcotics on his person.

The special employee Kalchinian then left the government vehicle and walked south on the west side of Eighth Avenue to 21st Street. At 21st Street and Eighth Avenue he met the defendant Sherman, the man sitting at the table next to Mr. Lowenberg (indicating).

(46) The special employee and the defendant walked west on the north side of 21st Street to Ninth Avenue. At Ninth Avenue they turned south and walked on the east side of Ninth Avenue to 19th Street. At 19th Street they turned east and walked about a quarter of the way down the block where I saw the defendant hand something to the special employee.

Raymond C. Rudden—for Government—Direct

The special employee and the defendant then walked to the corner of Eighth Avenue and 19th Street. At this point the special employee left the defendant and walked north, and he was later joined by me at the vicinity of 23rd Street and Eighth Avenue.

Q. Did you follow Kalchinian from the time he left the defendant? A. Yes, sir.

Q. What did you do when you rejoined him? A. When I rejoined the special employee we entered the government car, and in the government car the special employee handed me a Chesterfield cigarette package which contained a glassine envelope of white powder.

Q. Did you search the special employee? A. I searched the special employee and found some change on him.

Q. Nothing else? (47) A. No narcotics.

Q. Had you found change on him the first time you searched him? A. No, sir, I did not.

I then left the special employee and went south on Eighth Avenue where I saw agent Melikian at the vicinity of Eighth Avenue and 17th Street. I then drove to 16th around the block, and parked the car at—near the vicinity of—on 17th Street near the vicinity of Eighth Avenue just a little way off Eighth Avenue.

I followed agent Melikian into 264 West 17th Street.

As I entered the building I saw the defendant standing in the doorway of his home, or his apartment, the first apartment on the left as you entered the building.

Agent Melikian had placed the defendant under arrest and from the defendant's person Melikian had taken a number of bills, and among these bills were the two previously listed bills that agent Melikian had noted at the Whalen drug store.

Q. Agent Rudden, I show you Government-Exhibit 1 in evidence and I ask you if you have seen that before? A. Yes, sir, I have.

Raymond C. Rudden—for Government—Cross

Q. Will you state what it is, sir? (48) A. This is a piece of paper on which agent Melikian noted the numbers of the bills that we used in the purchase, the exhibit there, on November 16th, sir, and I recognize it by my signature at the bottom of the page.

Q. Thank you, sir. After the events that you have just described on 17th Street what did you do?

The Court: Just a moment. Where was it?

The Witness: West 17th Street.

Q. Pardon me? A. West 17th Street.

Q. Pardon me. What did you do then? A. I remained in the apartment, and I searched the room in which the defendant and Agent Melikian were standing.

After that we left and drove the defendant down to the Bureau of Narcotics.

Q. What did you do with the package which Kalchinian gave you at the time you searched him the second time?

A. I turned that evidence over to agent Melikian, sir.

Mr. Monroe: You may examine.

(49) *Cross Examination by Mr. Lowenberg:*

Q. When did you meet Mr. Kalchinian for the first time, Mr. Rudden? A. On November 16th at approximately a little after 11 A.M., sir.

Q. And that is when you went out on this so-called investigation? A. That is the first time I went out on this investigation.

Q. You did not know him before that? A. No, sir.

Q. You did not know how long a record he had either?

A. Do I know now, sir?

Q. Yes, sir. A. I don't particularly know what record he has, sir.

Raymond C. Rudden—for Government—Cross

Q. Were you interested in finding out, or trying to find out how Kalchinian met this defendant? A. No, sir.

Q. That you weren't interested in? A. At that time, sir?

Q. Yes. A. No, sir.

Q. Or even after the arrest? (50) A. No, sir, I was not.

Q. You were not? A. No, sir.

Q. All you were interested in was to see the passing of an envelope between this defendant and the special employee; isn't that the truth? A. No, sir.

Q. All you were interested in was to see the passing of narcotics, is that right? A. No, sir.

Q. Well, you searched the defendant's premises you say? A. I searched the room in which the defendant was standing, sir.

Q. You were not asked it by Government counsel, but I will ask you did you find any narcotics there? A. No, sir.

Q. Did the defendant tell you that he was working there? A. At that time the defendant told me he collected rent for the building.

Q. And did he tell you he also managed the place? A. No, sir.

Q. Were you interested in trying to find out how (51) many times Kalchinian had spoken to this defendant about getting narcotics before this event on November 16th? A. No, sir.

Q. You weren't interested in that at all, is that right? A. That is right, sir.

Q. And you weren't interested in what Kalchinian was doing with this defendant prior to November 16th? A. That is correct, sir, I was not interested before the 16th.

Q. That is right. And all you did was to go out and Kalchinian told you that he expected some narcotics and

Raymond C. Rudden—for Government—Cross

you went out as an observer in an automobile to see the narcotics passed; is that right? A. No, sir.

Q. Well, you were there for that purpose, weren't you?

A. I mean if you eliminate the automobile it would be correct.

Q. You were there solely for the purpose of seeing it passed? A. No, sir, I wouldn't say that, sir.

Q. Well, did you see to check to see whether Kalchinian induced this defendant to give him any narcotics? (52)

A. No, sir.

Q. Did you try to check to see whether this defendant was entrapped into giving—by Kalchinian into giving Kalchinian any narcotics?

Mr. Monroe: I object, if your Honor please. The question calls for a legal conclusion.

The Court: I will allow it.

The Witness: Will you repeat that, sir?

Q. Were you interested in finding out whether Kalchinian entrapped this defendant into giving him some narcotics? A. As far as being interested, I would like to have you clarify that, sir.

Q. Did you investigate it? A. No, sir, I did not investigate it.

Q. Did you investigate to see whether there was a division of narcotics between them for their own use, both being addicts? Were you interested in that? A. I did not investigate it, no, sir.

Q. No. All you were interested in as a government agent was to see somebody hand somebody else an envelope containing narcotics, isn't that the truth? A. No, sir.

Q. What were you interested in? Were you (53) interested in something else? A. Yes, sir.

Q. All you were interested in was to evidently go to the

Raymond C. Rudden—for Government—Cross

defendant's premises, search him to see whether you could find any narcotics there, isn't that correct? A. No, sir.

Q. Well, you did search him? A. Yes, sir.

Q. And did you have a search warrant when you searched him? A. No, sir.

Q. Did the defendant object to your searching the premises? A. Did the defendant object to my searching the room that he was standing in, sir?

Q. Yes. A. No, sir.

Q. You went right ahead and searched it, right? A. That is correct.

Q. And you searched it for narcotics, didn't you? A. Yes, sir.

Q. And you found none? A. That is correct.

Q. So you were interested there in seeing whether (54) you could find any narcotics, isn't that correct? A. At that time I was, yes, sir.

Mr. Lowenberg: I see. That is all.

The Court: Any redirect?

Mr. Monroe: No redirect.

(Witness excused.)

The Court: Is the next witness Kalchinian?

Mr. Monroe: No, sir, another agent.

The Court: Another agent.

Mr. Monroe: Yes, sir.

The Court: All right.

Mr. Monroe: James Hunt, please.

James C. Hunt—for Government—Direct

JAMES C. HUNT, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Monroe:

Q. What is your occupation, Mr. Hunt? A. Narcotic agent.

Q. And for how long have you been such narcotic agent?

A. August 15, 1951.

Q. Were you employed in that capacity on November 1, 1951? (55) A. Yes, sir, I was.

Q. Will you describe your activities as a narcotics agent on that day, please? A. Agent Melikian and I met special employee Ballow—

Q. Pardon me. Do you know Ballow's true name, sir? A. No, sir, I don't.

Q. Would you continue, please? A. At 46th Street and Eighth Avenue in the government vehicle.

Special employee Ballow got into the government vehicle and told us he could purchase narcotics from George Sherman.

I thereupon searched him and found no narcotics or money on him.

We then drove to 24th Street and Eighth Avenue where agent Melikian provided him with \$15 of government advance funds.

Special employee then got out of the government vehicle and agent Melikian and I followed him to the northwest corner of 20th Street—the northeast corner, excuse me, of 20th Street and Eighth Avenue.

At this point we observed the special employee standing on the corner and until such time as the (56) defendant George Sherman beckoned to him to come into the street,

James C. Hunt—for Government—Direct

which was 20th Street, and the special employee walked east into 20th Street.

Q. Did you see the defendant Sherman at that time?

A. Yes, sir.

Q. Would you point him out, please? A. He is the gentleman seated to the right of the attorney in the brown suit.

Mr. Monroe: May the record show the witness indicated the defendant Sherman.

Q. Will you continue, please? A. The defendant Sherman then walked east on 20th Street, and on the south side of the street, and he was joined by the special employee Ballow, and midpoint through the block in front of the police station he was observed by myself, and I was with agent Melikian, to hand something to the special employee, and in turn the special employee was seen—

The Court: In front of the precinct house?

The Witness: Yes, sir.

The special employee was seen to count out something and hand it to the defendant.

The special employee then returned to the government vehicle parked on 24th Street and Eighth Avenue (57) where I again searched him and found no money on him.

He gave the evidence, which was a white powder contained in an empty Pall Mall cigarette package to agent Melikian.

Agent Melikian and I myself affixed our initials and the date to the evidence contained in the glass-enclosed envelope and the empty Pall Mall package.

Q. You stated you searched the special employee at that time? A. Yes, sir.

40

James C. Hunt—for Government—Direct

Q. And you found no narcotics on him? A. Yes, sir—no, sir.

Q. State in your own words did you find any narcotics on him? A. No, sir, I did not find anything on his person except—observed nothing except what he handed to agent Melikian.

Q. Were you again engaged in your duties as a narcotic agent on November 7, 1951? A. Yes, sir, I was.

Q. Will you describe your activities on that day, sir? A. I was in the company of agent Coyle and agent Melikian in the government vehicle when we met special employee Ballow at approximately 12 o'clock.

(58) I searched the special employee and found no narcotics or money on his person.

Then we drove to 21st Street and Ninth Avenue. At this location agent Melikian provided him with \$15 of government advance funds. He then left the government vehicle and walked to the northeast corner of 20th Street and Eighth Avenue.

Agent Melikian and I observed him at this particular location, and at approximately 1:20 I saw the defendant Sherman walking north on Eighth Avenue. He was joined by the special employee. The special employee and the defendant Sherman walked to 20th Street and Eighth Avenue, and then right to the southwest corner of 21st Street and Seventh Avenue, where I saw the defendant take from his right leather coat pocket something which he handed to the special employee. The special employee in turn handed something back to the defendant Sherman.

The defendant Sherman and the special employee then walked to 20th Street south, on Seventh Avenue and 20th Street, and then right or west into 20th Street.

The special employee remained on the north side of the street and continued walking in a westerly direction and the defendant south and entered 240 West 20th Street.

James C. Hunt—for Government—Cross

Agent Melikian and I continued observation of the (59) premises approximately ten minutes. Later the defendant Sherman came out and walked south on Eighth Avenue and then entered 264 West 17th Street.

Agent Melikian and I then suspended surveillance and returned to the government vehicle, which was parked at 21st Street and Ninth Avenue.

When we arrived in the government vehicle agent Coy was in possession of a white powder contained in a glass envelope which the special employee told us he had purchased from the defendant Sherman, and it was contained in an empty Pall Mall cigarette package. As in the first exhibit we affixed our initials and date to the package, and then we left.

Q. Did you again search the special employee at that time? A. Yes, I did.

Q. What did you find, if anything? A. I did not find anything on his person.

Mr. Monroe: Thank you. You may examine.

Cross Examination by Mr. Lowenberg:

Q. Mr. Hunt, is it? A. Yes, sir.

Q. When did you meet the special employee named Ballow, if you did, for the first time? (60) A. I believe that was the date of November 1st when I was with agent Melikian in the government vehicle.

Q. Do you know what Ballow's police record is? A. No, sir, I do not.

Q. Do you know that he has been under arrest for narcotics? A. No, sir.

Q. And was awaiting sentence in this court? A. No, sir, I was not aware of that.

Q. Do you know that it was only then that he agreed

James C. Hunt—for Government—Cross

to cooperate with the Federal Bureau of Narcotics? A. No, sir.

Q. Do you know anything about Ballow? A. No, sir.

Q. Were you interested in the man, to see the kind of man he is? A. I just completed my training course in the Treasury Department school in Washington and at the time I was just in the job when I was appointed in August, 1951, and I just returned to New York, and I was assigned to work with agent Melikian, and he was agent Melikian's special employee. I had nothing to do with him whatsoever.

Q. Well, did it occur to you to ask agent Melikian to see what kind of a fellow this Kalchinian is, whether (61) he is reliable or not? A. No, sir.

Q. Did Melikian ever make the suggestion to you that "We better check on this fellow Kalchinian to see whether he is reliable, whether he would frame people, whether he would induce people to sell narcotics"?

Mr. Monroe: I object to this, if your Honor please, as to what Melikian said, which is not material, what Melikian said to this witness.

Q. Did Melikian ever say to you "We better see what kind of a fellow this Kalchinian is, to see whether he will frame people, induce people and violate the law unlawfully when they do not want to"? A. No, sir.

The Court: May I tell the jury that when the witness answers no that does not mean that the question is evidence. In other words, are you still beating your wife, and you say no, that does not mean that you continue to beat her, or anything else. The only evidence is when the witness says yes or explains something. That is the evidence. The evidence is not in the question.

James C. Hunt—for Government—Cross

Q. Didn't you in your own mind think it was important to determine what kind of fellow this fellow (62) Kalchinian was? A. No, it was agent Melikian that had entire charge of him.

Q. And you never discussed that or made any suggestion to Melikian to see what kind of fellow Kalchinian is or was? A. No, sir.

Q. He was out on the street, wasn't he, to bring you cases or Melikian cases, isn't that right? A. Well, he volunteered his services I understood.

Q. And he volunteered them because he was awaiting sentence, isn't that true? A. I was not aware of that, sir.

Q. Are you aware of it now? A. I am still not.

Q. You are still not? A. No.

Q. And having volunteered his services, did you know that he would get a suspended sentence, by the way? A. No, sir.

Q. And having volunteered his services you were ready to accept them, is that correct? A. Yes, sir.

Q. Now, do you know how he met the defendant? (63) A. Now who is "he," sir?

Q. Ballow, how he met the defendant. A. No, sir.

Q. Weren't you interested in finding out? A. No, sir.

Q. All you were interested in, isn't it a fact all you were interested in was to see him pass that envelope containing the white substance, isn't that the truth? A. I was charged with that responsibility of covering the person.

Q. Isn't it the truth that all you were interested in was to see an envelope passed by this defendant to Ballow, isn't that the truth? A. No, sir, I wouldn't say that.

Q. You would not?

The Court: He said he would not say was the truth.

James C. Hunt—for Government—Cross

Q. You would not say that was the truth? A. No.

Q. Well, weren't you there for that purpose? A. The special employee told agent Melikian and I in the government vehicle that he could produce narcotics from the defendant. That is what I got to do, (64) make observations of persons in the purchase of narcotics and make arrests. That is the point I was interested in.

Q. That is what you were interested in? A. Yes.

Q. To make arrests? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. And also besides making arrest to observe the passing of envelopes, isn't that so? A. That is right.

Q. And you were not interested in what led up to it, were you? A. I was to represent myself. I was a new agent in the job. I was not very much more than that at that time. Agent Melikian was an experienced agent, and so I did not regard myself as competent to handle this special employee's services.

Q. Didn't you believe at that time that it was important to investigate and to find out what led up to the passing of the envelope? A. No, sir, because it was agent Melikian who was in charge.

Q. Do you consider it important now? (65) A. I am a more experienced agent now, and if a special employee was assigned to me I would certainly speak to him—

Q. Do you know— A. —because it would be my responsibility to make a thorough investigation of his background, which I know agent Melikian did.

Q. Do you know if it was done in this case? A. Agent Melikian advised me that he made a special investigation of this man's background.

Q. Do you know if Melikian made an investigation as to Ballow's background? A. Yes, sir, also the defendant.

Q. Will you tell me what background of Ballow he in-

James C. Hunt—for Government—Cross

vestigated? A. I don't know. All I want to know is that he did.

Q. Do you know whether Melikian testified that he made an investigation of Ballow's background in this courtroom? A. No, sir.

The Court: Sustained.

Q. Do you know how many arrests Ballow caused? A. No, sir.

Q. Have you discussed this case with any other (66) agent before coming to court here today? A. No, sir.

Q. When was the last time—did you ever discuss it with anybody? A. No, sir.

Q. You never discussed it with Melikian? A. No, sir.

Q. Or Coyle? A. Probably at the time that we were working on it but not since then.

Q. Not since? A. No, sir.

Q. Not before testifying at the last trial or this trial, is that it? A. We probably refreshed our recollection from the notes, contemporary notes we made at that time.

Q. And when you refreshed your recollection, having notes in front of you, did you talk about the incident?

A. Yes, because we have to sign our name to the truthfulness of the report.

Q. Now, did you discuss it since then? A. No, sir.

Q. You mean that having come to this courtroom this morning, and this investigation having taken place (67) in 1951, since then for a period of five years you have not discussed any of the facts in this case with Melikian, or any other agent? A. I just flew in from Buffalo this morning, and I reviewed the notes which we had made at that time. That is my basis of my recollection of these facts.

James C. Hunt—for Government—Cross

Q. How long had you been up in Buffalo? A. Four weeks.

Q. Four weeks? A. Yes.

Q. Were you in New York prior thereto? A. Yes.

Q. Did you know that this case was on the calendar? A. No, sir, I did not.

Q. When for the first time did you learn that this case was on the calendar? A. Last Friday at the close of another trial and I was recalled back to Buffalo, and Sunday our district supervisor called me at my home in Buffalo and told me that I had to testify here this morning.

Q. And when did you arrive? A. I got in on the 7:25 flight this morning.

Q. Did you see Melikian then? A. I did not see Melikian until just before I said (68) "Hello" to him in the hall.

Q. Just before? A. Yes.

Q. So you have not discussed it with anybody? A. That is right.

Q. And did you have occasion to look at your report this morning? A. Yes, sir, I did.

Q. Who brought the report to you? A. The report was over at 90 Church Street.

Q. You went over there? A. Yes.

Q. Did you see any agents? A. No, sir.

Q. I see. Were you there when the defendant's premises were searched? A. I don't recall that I was.

Q. Were you there when the defendant stated that he manages that rooming house and gets his living from it?

A. I don't recall that.

Mr. Monroe: If your Honor please, I object to this line of cross examination. This witness never testified that he was there at the time.

The Court: I will allow it.

Colloquy

(69) Q. Were you there when the defendant said, "get my living running this rooming house"? A. No, sir.

Q. Were you inside the premises at all? A. Not that I recall.

Q. Well, you don't recall whether you were there or not? A. I do have a vague recollection of having been there. That is about all I remember.

Q. Pardon me? A. That is about all I remember.

Q. Well, having a vague recollection of having been there, have you got a vague recollection of the premises being searched? A. Well, if I was there we must have searched it.

Q. Were any narcotics found? A. I don't believe so.

Q. And having a vague recollection of being there, do you also have a vague recollection that the defendant said "I get my living running this rooming house"? A. I don't recall that.

Q. You don't recall that? A. No, sir.

Mr. Lowenberg: I have no further questions.

(70) The Court: Any redirect?

Mr. Monroe: No redirect.

The Court: All right. Thank you. You are excused.

(Witness excused.)

The Court: I have kept you a little longer than usual, lady and gentlemen of the jury because we are going to recess now for the day.

Mr. Lowenberg asked me to sit only this morning to give him a chance to do some preparation that he did not have time for over the weekend. So we will adjourn now until 10:30 tomorrow.

I might explain to you a little bit about the pro-

Colloquy

cess of a case started. These cases are called in another room at 10:30, and there is quite a calendar that they have to call first, and then when they say the case is ready it is sent up to the Judge who is going to try it. Then there is usually a discussion with the lawyers in the robing room, and then when we are all clear we send for you, so that accounts for the hour's lapse of time before we actually start. However, we will adjourn now until tomorrow at 10:30 and may I ask you not to discuss the case either among yourselves (71) or with anyone else until it is finally submitted to you.

(At this point the jurors left the courtroom and the following proceedings took place in the absence of the jury:)

The Court: Gentlemen, if you wish to give me any requests to charge I will receive them tomorrow morning at 10:30 in writing.

I would suggest that we might possibly finish tomorrow, is that true?

Mr. Monroe: I think there is a possibility.

Mr. Lowenberg: There is a possibility, because I am going to rest on the Government's case.

The Court: All right.

Mr. Lowenberg: But before the requests to charge I should like your Honor to seriously consider what the Court of Appeals has said of this case, because, according to that opinion—

The Court: I shall certainly have to consider it.

Mr. Lowenberg: They said the evidence was conclusive as to entrapment, and that the only reason they were sending it back for a new trial is that they (72) are not bound to dismiss the indictment. That is the effect of their opinion.

Colloquy

Mr. Monroe: I think in that connection, your Honor, in connection with our discussion in chambers this morning, the Court of Appeals sent it back so the Government might adduce additional evidence, and that is what we propose to introduce, the prior convictions of this defendant.

Mr. Lowenberg: Why, one was in—

The Court: The Government's brief says that his convictions were 1942 and 1946.

Mr. Lowenberg: Yes, and that is so remote.

The Court: Did I understand you to ask one of the Government witnesses whether they knew the police record of the defendant?

Mr. Lowenberg: No, the police record of Ballow.

The Court: I have a note which says the defendant.

Mr. Lowenberg: No, the police record of Ballow, Judge, Kalchinian. That is what I asked each agent and confined myself to that.

The Court: Does that agree with your recollection?

Mr. Melikian: I am sorry, sir, but you did, (73) not ask that question of me.

Mr. Lowenberg: I asked the other two agents.

The Court: I am just telling you that I will check that with the court reporter. I have a note to that effect and, in fact, my hair almost flew off.

Mr. Lowenberg: Well, if I said that it should be Ballow, because—

The Court: Perhaps you may have said it and I missed it, but my note is to the contrary, and that you mentioned or said the defendant.

Mr. Lowenberg: Well, then, I will ask that he be recalled to correct it. I asked the agent whether—

Colloquy

The Court: You say you did not say the defendant?

Mr. Lowenberg: That is correct. That is my recollection.

Mr. Monroe: My understanding is that he was talking about Ballow or Kalchinian at that time.

Mr. Lowenberg: That is right, and nobody else.

The Court: Perhaps I am wrong, but the record will indicate what you said.

Mr. Lowenberg: And nobody else, but as far as the convictions are concerned, Judge, they are too remote from the date of this transaction to be received, (73-A) and, secondly, I claim it is improper to receive it.

The Court: I understand your position. Thank you.

(Adjourned to June 5, 1956, at 10:30 A.M.)

(74)

New York, June 5, 1956,
10:30 A.M.

(Trial resumed.)

(The following proceedings took place in the robing room:)

Mr. Monroe: Judge, I have a brief request which I would like to make, first with respect to the witness Kalchinian who was to be called by the Government today.

As Mr. Lowenberg indicated yesterday I had indicated to him a disposition not to call Kalchinian—

Colloquy

Mr. Lowenberg: Not that you intended, but you told me that you would not.

Mr. Monroe: —to which you objected strenuously, and I changed my mind.

I would like permission to examine Kalchinian now as a hostile witness.

Mr. Lowenberg: If your Honor pleases, I object to that, because in the previous trial Kalchinian—

The Court: I am not going to make any advance (75) rulings. You have to continue the trial the way the facts dictate and in accordance with your understanding of the law. You know how to examine a witness who is hostile, and I will rule at the appropriate time.

Mr. Monroe: All right, sir.

My next subject relates to the prior convictions, and if your Honor arrived at a decision at that point I would like to know whether the defense will stipulate as to the identity of this defendant, or will I be required to prove it?

Mr. Lowenberg: I object strenuously to evidence of prior convictions, and I might point out to your Honor that the Sorells case—

The Court: No, that was not the question.

Mr. Lowenberg: I will not consent.

The Court: All right.

Mr. Lowenberg: The Sorells case, your Honor—

The Court: I have read the case and I will not make any advance ruling.

Mr. Lowenberg: But will you not—

The Court: I am not making any advance rulings.

Mr. Lowenberg: I submit, Judge, that the reading from any record pertaining to the defendant's (76) conviction is prejudicial because the jury will have heard it—

Colloquy

The Court: Just a moment.

Mr. Lowenberg: —and even at that time if your Honor strikes it out it will be in the jury's mind.

The Court: Yes, but I still repeat I will not make any advance rulings.

Anything further?

Mr. Monroe: Second, in connection with the documentary proof of the narcotics in the case Mr. Lowenberg objected to them on the ground that no foundation was laid. I am wondering now if he will stipulate that the narcotics had been destroyed in the regular course.

Mr. Lowenberg: I would not stipulate to anything in a criminal case.

Mr. Monroe: I do not consider that the destruction of the narcotics has to be shown.

Mr. Lowenberg: Well, I think it has.

Mr. Monroe: But I am disturbed by his objection as to the foundation.

Mr. Lowenberg: I think it has to be, Judge, because otherwise they would have to be produced here.

The Court: Anything else?

Mr. Lowenberg: At least the failure of (77) production has to be shown.

The Court: Anything else?

Mr. Monroe: No.

Mr. Lowenberg: I have one request.

The Court: Do either one of you have any written requests to charge?

Mr. Lowenberg: As far as trial tactics are concerned—

The Court: Do you have any written requests?

Mr. Monroe: Only with respect to this, if your Honor pleases.

Colloquy

Mr. Lowenberg: I am sorry that I have to give it to you in this form without a back, your Honor, a legal back.

The Court: That is all right.

Mr. Lowenberg: I think as far as the trial practice is concerned, and I assume that this is all part of the trial record, this discussion—

The Court: Yes.

Mr. Lowenberg: —I intend to call Mr. Monroe to the witness stand for one purpose. I think that I am privileged to show the attitude of the Government as far as the transaction of this particular defendant (78) is concerned, and what I have in mind is this—

The Court: That is not my problem.

Mr. Lowenberg: Pardon me?

The Court: I will not make any advance ruling.

Mr. Lowenberg: You will not?

The Court: No.

Mr. Lowenberg: All right. I will call him, Judge.

(At this point the conference in the robing room terminated and the following proceedings took place in open court in the presence of the jury:)

The Court: Please call your witness.

Mr. Monroe: George W. Romig, please.

George W. Romig, Jr.—for Government—Direct

GEORGE W. ROMIG, JR., called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Monroe:

Q. Mr. Romig, what is your occupation? A. I am the chief chemist in the Treasury Department laboratory in New York City.

Q. And as such chemist are you the custodian of the records of that laboratory? (79) A. I am.

Mr. Monroe: Government Exhibit 2-B for identification.

(Marked Government Exhibit 2-B for identification.)

Q. Mr. Romig, I show you Government Exhibit 2-B for identification, and I ask you if that is a record of your laboratory maintained by it in the regular course of its business? A. It is.

(Mr. Monroe hands document to Mr. Lowenberg.)

Mr. Lowenberg: I will object to it, if your Honor pleases, upon two grounds; one, that a proper foundation has not been laid and, No. 2, that it is not the best evidence.

The Court: Please let me see the other two.

Mr. Monroe: The ones that are already in evidence?

The Court: Yes.

Now you say, Mr. Romig, that this is a record from your laboratory?

The Witness: It is.

George W. Romig, Jr.—for Government—Direct

The Court: And is it the regular practice to keep this record?

(80) The Witness: It is.

The Court: I will receive it.

Mr. Lowenberg: Exception.

(Government Exhibit 2-B for identification received in evidence.)

Q. Mr. Romig, with respect to Government Exhibit 2-B in evidence, does that show the result of the chemical analysis of the items listed in the top part of the exhibit?

Mr. Lowenberg: Objection to on the ground that it is in evidence and it speaks for itself.

The Court: Sustained.

You can read it, Mr. Monroe, if you want.

Mr. Monroe: Very well, your Honor.

3-B for identification.

(Marked Government Exhibit 3-B for identification.)

Q. Mr. Romig, I show you Government Exhibit 3-B for identification, and I ask you if that is a record maintained by your laboratory in the regular course of its business?

A. It is.

(Mr. Monroe hands document to Mr. Lowenberg.)

(81) Mr. Lowenberg: Same objection, if your Honor pleases.

The Court: Same ruling.

Mr. Lowenberg: Before your Honor receives it may I ask one question on the voir dire?

*George W. Romig, Jr.—for Government—
Preliminary Cross*

The Court: Yes.

Preliminary Cross Examination by Mr. Lowenberg:

Q. You typed this out yourself? A. No.

Q. You can't swear to the accuracy of the contents of this exhibit? A. Yes, I can.

Q. Well, did you type it out? A. No, but if you notice I verified it and I have my okay on it, and I signed the report.

Q. When did you put your okay on it? A. The date that the—if you will let me see it I can tell you.

Q. (Handing to witness.) A. November 14, 1951.

Q. November 14th? A. That is right.

Q. 1951? A. That is right.

(82) Q. And you did not put it on until that date, is that correct, November 14th? A. I did not put what on?

Q. The okay. A. No, I put the okay on in my signature.

Q. On the 14th of November? A. That is right.

Mr. Lowenberg: I press my objection, if your Honor pleases.

The Court: Same ruling.

Mr. Lowenberg: Exception.

(Government Exhibit 3-B for identification received in evidence.)

Mr. Monroe: 4-B for identification.

(Marked Government Exhibit 4-B for identification.)

Q. Mr. Romig, I show you Government Exhibit 4-B for identification and I ask you if that is a record of your

*George W. Romig, Jr.—for Government—
Preliminary Cross.*

laboratory maintained by it in the regular course of its business? A. It is.

(Mr. Monroe hands document to Mr. Lowenberg.)

Mr. Lowenberg: May I ask one question on the voir dire, Judge?

(83) *By Mr. Lowenberg:*

Q. Part of this report was information that was furnished to you by somebody else under No. 4 "Remarks," is that true? A. That is correct.

Q. So you can't swear to the accuracy of those remarks can you? A. In the upper half, that is typed in by the narcotic agent.

Q. I see. A. And the lower half is my report.

Q. But I say you can't swear to the accuracy of No. 4 "Remarks," can you? A. Certainly not.

Q. No. You don't know that of your own knowledge do you? A. (No answer.)

Q. You don't know that of your own knowledge? A. What of my own knowledge?

Q. Remarks, No. 4, what was typed in there. A. I don't understand what you mean.

Q. I will show it to you. Have you got personal knowledge of what was typed in there? A. No.

(84) Q. No? A. No. I said that before.

Q. And that is true of the other reports that were shown to you, is that true? A. That is true.

Q. Wherever there were "Remarks"? A. As to the upper half only.

Q. The upper half only? A. That is right.

Mr. Lowenberg: I will press my objection.

*George W. Romig, Jr.—for Government—
Preliminary Cross*

The Court: Is the upper half the same as the top part of the other exhibits?

Mr. Monroe: Yes, sir.

Mr. Lowenberg: I submit that your Honor should look at them.

The Court: Counsel has represented to me that it is the same. Do you dispute that it is the same?

Mr. Lowenberg: I do not dispute it, but I have not seen it.

The Court: You have not seen the exhibits?

Mr. Lowenberg: No, the exhibits that were introduced yesterday.

The Court: You did not see them yesterday?

Mr. Lowenberg: Yesterday I saw them, yes, (85) Judge.

The Court: Very well. Where are they now?

Mr. Lowenberg: May I look at them, Judge?

Mr. Monroe: I think you still have them. I handed them up to you a minute ago.

The Court: Yes. Do you want to look at them and compare them?

Mr. Lowenberg: Yes, Judge. That is what I would like to do for a minute.

The Court: Here are the ones dated November 1st and November 7th. Did you want to compare those?

Mr. Lowenberg: That is what I want to compare, Judge.

The Court: But you are comparing now the two that I handed you, dated November 19th.

By Mr. Lowenberg:

Q. And was the top of this report typed by you?

*George W. Romig, Jr.—for Government—
Preliminary Cross*

The Court: "This" meaning—

Mr. Lowenberg: Meaning on the voir dire, Judge.

The Court: And "this" means what exhibit number?

Mr. Lowenberg: Exhibit 4-A.

(86) The Court: Yes.

Q. Exhibit 4-A, referring to the top of that report? A. Yes.

Q. And did you type that from the report of the agent the top part? A. The top part is not—we have nothing to do with that at all. In other words, that is not—that was typed in by the narcotic agent.

Q. I see. By the narcotic agent? A. That is right.

Q. So that you would not have any personal knowledge of that either, the top part of this report? A. Except the information is used in connection with the case, with the narcotics that came with the form.

Q. And that information is given to you by a narcotic agent? A. That is right.

Q. And you don't know that of your own personal knowledge either, the top part of it? A. Well, as I said, this particular form—

Q. Yes? A. —comes in with the narcotics.

Q. Yes? (87) A. And, of course, there is a connection between the top part and the narcotics which are submitted at the same time.

Q. And that is all based upon the agent's written report isn't it? A. This is—this is—well, I don't know anything about any report. This particular form comes in with the narcotics.

Q. I see. A. Then as the narcotics are analyzed we file in our report at the bottom.

Q. At the bottom? A. That is right.

*George W. Romig, Jr.—for Government—
Preliminary Cross*

Q. So that to understand you correctly you have no personal knowledge as to part 4 what is typed in there, that information there, is that correct? A. As to—

Q. As to the remarks. A. As to the different details?

Q. Yes. A. No, I am not. Of course, that is connected with the narcotics which came in at the same time.

Q. I understand that that is all predicated on information that an agent supplies? (88) A. That is right.

Q. Is that right? A. That is right.

Q. And you have no personal knowledge of that? A. No.

Q. That is what I mean. A. That is right.

Mr. Lowenberg: I press my objection, if your Honor pleases.

The Court: I renew my question. Is it agreed that the exhibits that were introduced yesterday are copies as far as the top part of each one is concerned, and it is the same as the top part of exhibits now introduced as 2-B, 3-B, and 4-B?

Mr. Monroe: That is correct.

The Court: Can we agree on that?

Mr. Lowenberg: Yes, sir.

The Court: So that when you got these papers the top part had already been filled in by the agent?

The Witness: That is correct.

The Court: And attached to it all in some manner?

The Witness: Yes, sir.

The Court: And you got the narcotic drugs (89) at the same time or the drugs suspected of being narcotics at the same time?

The Witness: That is right.

The Court: Then you analyzed each one and put in your findings on the middle or bottom half?

George W. Romig, Jr.—for Government—Direct

The Witness: That is correct.

The Court: I will receive them all.

Mr. Lowenberg: Exception.

(Government Exhibit 2-B, 3-B and 4-B for identification received in evidence.)

By Mr. Monroe:

Q. Mr. Romig, after your laboratory performed an analysis of these drugs, can you state what disposition was made of them?

Mr. Lowenberg: Objected to as too general, if your Honor pleases.

The Court: You can tell us generally.

A. A form is submitted by the Bureau of Narcotics to my office, requesting the return of the narcotics, and once a month the narcotic agents come to my office and pick up the narcotics based on this form which is sent to me, and then I get a receipt for the narcotics, which they take away once a month.

Mr. Monroe: Exhibit 5 for identification.

(90) (Marked Government Exhibit 5 for identification.)

Q. Mr. Romig, I show you Government Exhibit 5 for identification, and I ask you if that is a record maintained by your laboratory in the regular course of its business?

A. This is one of my records which I get after I get a receipt for the narcotics returned to the Narcotic Bureau.

Q. Does the receipt appear on that record? A. It does.

Q. Mr. Romig, I show you again Government Exhibits

George W. Romig, Jr.—for Government—Direct

2, 3 and 4-B in evidence, and I ask you if the numbers on Government Exhibit 5 in evidence are the index numbers for the items referred to on Government Exhibits 2, 3 and 4-B?

Mr. Lowenberg: Objected to, if your Honor pleases.

The Court: On what ground?

Mr. Lowenberg: They speak for themselves. They are in evidence.

The Court: Yes, but are they in evidence?

Mr. Monroe: 5 is not in evidence as yet, your Honor.

Mr. Lowenberg: Then I object to it, Judge, (91) comparing it with something not in evidence.

A. Yes, the numbers—

Mr. Lowenberg: Just a moment.

The Court: No, I sustain the objection.

The Witness: I am sorry.

The Court: Objection sustained.

(Mr. Monroe hands document to Mr. Lowenberg.)

Mr. Lowenberg: Are you offering this?

Mr. Monroe: Yes.

Mr. Lowenberg: I object to it, if your Honor pleases, upon the ground that no proper foundation has been laid for its receipt in evidence, and upon the further ground that it is not the best evidence. The narcotics would be, and I would particularly call your Honor's attention, in view of the fact that it is not in evidence, the two lines under the type-written section here (indicating).

Charles Kalchinian—for Government—Direct

I submit the Government is bound by that declaration contained therein.

The Court: I will receive Government Exhibit 5:

(Government Exhibit 5 for identification received in evidence.)

Mr. Lowenberg: Exception.

Mr. Monroe: You may examine.

(92) Mr. Lowenberg: I have no questions.

The Court: Did you want to read any of these exhibits to the jurors, Mr. Monroe?

Mr. Monroe: I expect to read them on summation, if your Honor pleases.

The Court: On summation?

Mr. Monroe: Yes, sir.

The Court: All right.

Do you have another witness?

Mr. Monroe: Yes, sir, Charles Kalchinian.

CHARLES KALCHINIAN, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Monroe:

Q. Mr. Kalchinian, have you ever been convicted of a crime? A. Yes, sir, I have.

Q. When were you so convicted and what was the crime? A. I was charged and convicted for—

Mr. Lowenberg: I can't hear the witness, Judge. May I pull up?

The Witness: I was charged and convicted—

Charles Kalchinian—for Government—Direct

The Court: Just a moment. Can you keep (93) your voice up just a little louder so the lawyer and all the jurors can hear you?

The Witness: Yes, your Honor.

I was charged and convicted for a sale of a package of narcotics twice to one man in 1952. It occurred in 1951, but I was—

Q. When were you arrested for that crime? A. In '51, sir.

Q. Do you recall the month? A. I believe about the early part of May or June, I forget quite which, about June I believe, '51.

Q. By whom were you arrested? By what agency? A. One agent's name I recall, agent Steffren.

The Court: The prosecutor means were you arrested by the New York City police or the Federal agents?

Q. Was that an agent of the Federal Bureau of Narcotics? A. Yes, sir.

Q. Following your arrest did you perform services for the Federal Bureau of Narcotics? A. Yes, I did.

Q. At the time of your arrest were you addicted to the use of narcotics? (94) A. Yes, I was.

Q. For how long thereafter were you addicted? A. Thereafter off and on a few months.

Q. Do you know the defendant? A. Yes, I do.

Q. Will you point him out, please? A. The gentleman sitting at the left of counsel.

Mr. Monroe: May the record show that the witness has identified the defendant Joseph Sherman.

Charles Kalchinian—for Government—Direct

Q. Will you state the circumstances under which you first met the defendant? A. I met him at a doctor's office.

I had gone to him to seek a treatment for the cure of narcotic addiction, and I met the defendant there.

Q. About when did you first meet the defendant? A. In the latter part of August, 1951.

Q. Did you speak to him at the doctor's office? A. No, I didn't.

Q. Did you ever speak to him? A. Yes, I did speak to him.

Q. When did you first speak to him? A. At first just a word of greeting in the office as I had seen him a half dozen times there, and later on the street outside, on the avenue, First Avenue.

(95) Q. When you spoke to him on the street outside will you state what that conversation was? A. Well, the first time it was just a word of greeting, and another time or so about the same, and as I used to go to a pharmacy to have the prescription filled, I used to see him there also, and coming out sometimes on the street I would speak to him and ask him just routine everyday greeting words, and ask him how things were going.

Q. Did your conversation with the defendant ever proceed beyond the routine greeting? A. How do you mean?

Q. Well, you said you spoke to him words of routine greeting. A. Oh, beyond that, yes.

I did ask him what his experiences had been.

And he told me, and he asked me the same.

And I told him what I had been going through and so on.

Q. When you state what his experiences had been, can you state in more detail what your conversation was? A. Well, we spoke to each other, such as many people who go through operations, they ask about their (96) mutual experiences, and that was the gist of the conversation.

At first I asked him if he had been getting drugs, what

Charles Kalchinian—for Government—Direct

quality, and so on. And the conversation went along those lines at first:

Q. And about when did the conversation take this turn?

A. I would say about the end of August.

Q. Did you ever speak to the defendant about introducing you to his connections?

Mr. Lowenberg: Objected to as leading the witness, Judge.

The Court: Reframe the question. I will sustain the objection.

Q. In the course of your discussion with the defendant about your addiction, did you ever ask him anything further? A. Yes, I did.

After awhile I asked him if there was a reliable man I could meet some time, that I needed him, and I asked him along those lines.

Q. And what did he say to you? A. He told me that he did know some people.

Q. And what did you say to him? (97) A. I asked him if it were possible for me to meet some of these people, or one perhaps.

Q. And what did he say? A. He didn't say anything at the time. But I spoke to him again on that subject.

And he said no, he couldn't see how I could meet this particular person, this one in particular.

And I asked him why not?

And he explained that the man was going out of business, turning it over to someone else, and in this change and so on he didn't think that I could meet him at all.

Q. Did you ever tell the defendant the purpose for which you wanted to meet this man? A. Yes. I told him I was not responding to treatment very well and I needed something for myself to sustain myself to a level. But he couldn't see how he could introduce me to him.

Charles Kalchinian—for Government—Direct

Q. Did he offer any alternative suggestion? A. I asked him what he had to suggest. I said, "How can I then?"

And he said to me that he might be able to get it, to see that I get it.

Q. Did you have any further conversation with him (98) after that? A. Yes, I asked him again on another occasion.

And he said he was working on it, and so on.

Q. Did the defendant ever produce any narcotics for you? A. Well, not in the same circumstances, but I told him that if he was going to do something for me how could I contact him?

He asked me then where he could contact me, and I could see that he would not give me some way to reach him. So he asked me and I told him where I worked. I worked nights, 11 at night until 8 o'clock in the morning.

So I gave him my telephone number where I worked and told him to call me whenever he was ready.

Q. Did you and the defendant ever discuss what he should say to you when he called you?

Mr. Lowenberg: Objected to as leading the witness.

The Court: I will overrule the objection.

Q. Will you answer the question, please? A. Yes, there was an arrangement we had made whereby we did not need to converse on the telephone. (99) All he had to do was to identify himself, and I would ask him when would the meeting take place, perhaps tomorrow? He would tell me yes, and I would go to meet him. The meeting place was arranged to take place at a certain avenue and corner street. So we did not discuss it on the telephone, as the place was understood to be that place except for the hour. That is all.

Charles Kalchinian—for Government—Direct

Q. So that when he called you he simply identified himself? A. Yes, sir.

Q. And you asked him when to meet him?

Mr. Lowenberg: Objected to, if your Honor pleases, as repetition.

The Court: I will allow it.

A. Yes.

Q. What was the place that you agreed upon as the place of meeting? A. We were to meet at all times or whenever we met on Eighth Avenue at the corner of 20th Street.

Q. Did the defendant ever call you for this purpose?

A. Yes, he did.

Q. When was the first time that he called you? A. Well, about the first part of September.

Q. Did you set up a meeting with him? (100) A. Yes, I did.

Q. Did he deliver narcotics to you at that time? A. Yes, he did.

Q. How frequently thereafter did the defendant call you at your place of business? A. Well, he called me fairly often. I would say three or four times a week.

Q. Would you arrange a meeting at each of these calls?

A. Not always, but fairly often, yes.

Q. Were you satisfied with the merchandise that the defendant was conveying to you in this manner?

Mr. Lowenberg: Objected to.

The Court: Sustained.

Q. Mr. Kalchinian, when did you first decide to report these activities to the agents of the Federal Bureau of Narcotics? A. Toward the end of October.

Charles Kalchinian—for Government—Direct

Q. What did you do at that time? A. I went to see one of the government agents, and I told him that—

Mr. Lowenberg: I object to what he told him.

The Court: Sustained.

A. I went to see an agent of the government, of (101) the Bureau of Narcotics.

Q. Do you recall the agent that you saw? A. Yes, sir.

Q. Who was it? A. Agent Melikian.

Q. And after you talked to agent Melikian did you talk to anyone else at the Bureau of Narcotics? A. I must have talked to another gentleman perhaps, but I don't recall very well.

Q. Did you tell your story to any other gentleman besides agent Melikian?

Mr. Lowenberg: Objected to, the wording of that question, "Did you tell your story to him." I submit that is a characterization by the Government counsel.

The Court: Well, he is the only one talking, and by the Government counsel do you say?

Mr. Lowenberg: Pardon me?

The Court: By the Government counsel?

Mr. Lowenberg: That is another way, Judge, of trying to get in a conversation.

The Court: I said "By the Government counsel," and he is the only one talking, so that I could infer that it was he that you were objecting to in connection (102) with the characterization.

Mr. Lowenberg: Yes.

The Court: I will sustain the objection.

Q. You went to the Bureau of Narcotics at this time to report your dealings with this defendant, did you not?

Charles Kalchianian—for Government—Direct

Mr. Lowenberg: Objected to.

The Court: I will allow it.

A. I went there and spoke to Mr. Melikian about a person I could purchase narcotics from.

Q. Did you speak to anyone else besides Mr. Melikian?

The Court: He said someone else whose name he forgot.

A. Someone else who I cannot recall at this time. I can't recall his name.

Q. Did this other person question you with respect to this transaction?

Mr. Lowenberg: Objected to.

The Court: I will allow it.

Q. Will you answer? A. I don't recall.

Q. Did he ask you to describe the person with whom you were having these dealings?

(103) Mr. Lowenberg: Objected to.

The Court: I will allow it.

A. Yes, now I recall. I did speak to a gentleman of the Narcotic Bureau, a Mr. Levine.

The Court: Mr. Levine?

The Witness: Sam Levine, I believe his name is, and I believe Mr. Melikian spoke to him, asked me the description, to describe the defendant.

After someone went in and got a file of photographs and they were laid in front of me and—

Mr. Lowenberg: I will object to all of this, if your Honor pleases.

Charles Kalchinian—for Government—Direct

The Court: Yes, I will sustain the objection.

Q. After you conversed with the agents at the Federal Bureau of Narcotics did they give you instructions? A. They told me that before—

Mr. Lowenberg: I object to what they told him, Judge.

The Court: The question is did you receive some instructions from them.

The Witness: Not actually instructions.

The Court: The answer is no.

Q. Did the defendant Sherman call you in the manner that you have described after your visit to the (104) Federal Bureau of Narcotics? A. Yes, he did.

Q. And what did you do after he called you? A. After he called me in the morning I called agent Melikian and told him that I was to make a purchase that morning.

Q. Do you recall the date? A. It was on November 1st.

Q. Will you state what happened after you called agent Melikian? A. Agent Melikian told me to be at a certain place, and we made an appointment.

Q. Were you at that place? A. Yes, I met him there.

Q. Did you meet anyone else there? A. That morning I met agent Hunt and Mr. Melikian.

Q. And what happened when you met them? A. I met them, and I got into their car.

I was searched by agent Hunt, and when he was finished with his search Mr. Melikian handed me \$15. *

Q. And what happened then? A. We drove to—a little south—we were then at 46th Street and Eighth Avenue, and we drove down to 24th Street and Eighth then.

(105).Q. What did you do then? A. I got out of the car and walked to the place where I was to meet the defendant.

Charles Kalchinian—for Government—Direct.

Q. What happened? A. I waited for him, say, perhaps three-quarters of an hour, and I finally saw him.

He motioned me to follow him.

And I followed him. I joined him on 20th Street. We walked east towards Seventh Avenue. We were there on Eighth Avenue, and about the middle of the block I asked him did he have the package for me.

Q. And he said he did, and handed it over to me.

And I gave him the \$15.

Q. Did you have any arrangement whereby you would indicate to agent Melikian that the deal had been made?

A. We had a prearranged signal whereby I was to put a newspaper in my coat pocket as a signal that I had made a purchase.

Q. Did you do that then? A. Yes, I did.

Q. What did you do then? A. We parted company. The defendant and I both walked to Eighth Avenue, and I walked to the government vehicle at 24th and Eighth.

(106) Q. And what happened there? A. Mr. Hunt searched me. I mean first I handed him this package and he searched me. And Mr. Melikian was there shortly after, and we spoke a couple of minutes and parted company.

Q. Did the defendant call you again after this transaction you described? A. Yes, he did.

Q. How soon thereafter? A. Well, I told you he called me fairly often.

Q. How long after this transaction did he call you? A. I believe he called me the night after.

Q. He called you the next night? A. Yes, I believe so.

Q. Did you arrange to meet him again? A. Perhaps not that time, but perhaps the time after that.

Q. Did you buy further narcotics from him? A. Yes, I did.

Q. Was this on your own account, or on the account of the government?

Charles Kalchinian—for Government—Direct

Mr. Lowenberg: Objected to.

The Court: Yes, the question is bad.

Q. The very next day that he called you after the (107) transaction which you have just described on November 1st, did you inform the agents of that transaction?

Mr. Lowenberg: Objected to, if your Honor pleases.

The Court: I will allow it.

Mr. Lowenberg: Exception.

A. No, I did not.

Q. When was the next time that the defendant called you after that? A. Perhaps the next night, or the night after that.

Q. Did you make an arrangement to buy further narcotics from him at that time?

Mr. Lowenberg: Objected to as leading the witness.

The Court: I will allow it.

A. Yes, I did.

Q. Did you inform the agents of that transaction? A. No, I did not.

Q. When was the next time that you informed the agents of a pending transaction with this defendant? A. On the morning of November 7th.

Q. Did the defendant call you first? A. He had called me during the night, yes, sir.

Q. And after you called the agent what did you do? (108) A. We made an appointment for that morning and we met again at a prearranged place.

Q. Who met you there at that time? A. There were three government agents, as I recall we had—I believe we

Charles Kalchinian—for Government—Direct

were, and when I say "we were" I mean I was with them, agent Hunt, Mr. Coyle, and Mr. Melikian.

Q. And what happened when you met at that time? A. I was searched by Mr. Hunt and after I got in the vehicle Mr. Melikian handed me \$15 again.

Q. And what did you do then? A. We drove down again to that vicinity; that is, at Ninth Avenue and 21st Street.

Q. And what happened there? A. I left the government car and walked to meet the defendant at 20th and Eighth Avenue.

Q. Did the defendant appear there? A. Yes, after, about an hour he did appear.

Q. And what did you do? A. When we crossed Eighth Avenue and we went on 21st street, this time due east, toward Seventh Avenue, and I asked him if he had something for me, and he did.

At the corner of Seventh Avenue and 21st Street he handed me the package, and I gave him the money.

(109) Q. Did you again give the signal? A. Yes.

Q. To the agent? A. Yes, I did, yes, the same pre-arranged signal.

Q. That is to say you put the newspapers in your pocket? A. I folded the newspaper in my pocket. That is right.

Q. What did you do then? A. I left the defendant there and I walked to the government car again on Ninth Avenue and 21st Street.

Q. And what happened when you got there? A. I was searched by I believe Mr. Hunt again, and the other agents came to the car, and we spoke a couple of minutes, and we parted company.

Q. When was the next time after this transaction that you have just described that the defendant called you? A. He called me perhaps that very night, or the night after.

Q. And did you arrange to make another purchase from him? A. Yes, I did.

Charles Kalchman—for Government—Direct

Q. Did you report that purchase to the Bureau of Narcotics? (110) A. No, I did not.

Q. Was this purchase consummated? Did you actually buy narcotics from him at that time? A. Yes, I did.

Q. When did he call you again? A. Perhaps a day or two after that.

Q. Did you report that incident to the Federal Bureau of Narcotics? A. I don't believe I did.

Q. Did you buy narcotics from him pursuant to that call? A. Yes, I did.

Q. When was the next time that you reported such a call to the Bureau of Narcotics? A. I called Mr. Melikian on the morning of the 16th of November.

Q. Did that follow the call to you by the defendant? A. Yes.

Q. Did you arrange to meet Mr. Melikian? A. Yes, I did. We made an appointment to meet about noon, about 11 rather.

Q. Where did you meet him? A. We met him in the vicinity of Eighth Avenue and 23rd Street.

(111) Q. What happened at that meeting? A. There I met agent Rudden and Mr. Melikian.

I was searched by agent Rudden and Mr. Melikian handed me again \$15.

Q. What did you do then? A. I walked over to meet the defendant. I met him shortly thereafter and we walked to 21st Street, due west, toward Ninth Avenue, and turned south on Ninth Avenue, walked to 19th Street. We turned left, east on 19th Street, and in that block and shortly after we turned around Ninth Avenue, the defendant gave me a package again, and I gave him the money and, as before, I put the newspaper in my pocket.

Q. What did you do then? A. I left the company, his company, and came to the government car at 23rd Street and Eighth Avenue.

Charles Kalchinian—for Government—Direct

Q. And what happened at that time? A. I met agent Rudden who searched me.

I at first handed him this package, and he searched me thereafter. We initialed the package and so on, and we parted company. Agent Melikian came soon after I believe.

Q. Now, you have testified I believe that prior to these purchases on the 1st, 7th, and 16th, and during (112) the period between those purchases on the 1st, 7th and 16th that you purchased narcotics from the defendant.

Mr. Lowenberg: Objected to.

The Court: I will allow it.

A. Yes, sir.

Q. On each of these purchases was the procedure the same as that which you have described for the 1st, 7th and 16th? A. Not quite.

Q. In what way did it vary? A. Well, I went there to get narcotics, and there was no signal, or anything of that kind. I met him and we walked awhile and we transacted business. That was the pattern of it.

Q. And each of these purchases except for the 1st, 7th, and 16th of November were for your own account, is that correct?

Mr. Lowenberg: Objected to.

The Court: I will allow it.

A. Yes, they were.

Q. And you did not inform the Bureau of Narcotics with respect to any of those?

Mr. Lowenberg: Objected to as having already been asked and answered.

(113) The Court: I will allow it.

Charles Kalchinian—for Government—Direct

A. No, sir, I did not notify anyone else about these purchases.

Q. Prior to the time you started buying from the defendant were you buying narcotics elsewhere?

Mr. Lowenberg: Objected to.

The Court: What relevancy would that have?

Mr. Monroe: On the question of the price paid, if your Honor pleases.

Mr. Lowenberg: Objected to.

The Court: I do not see why that would be relevant.

Mr. Lowenberg: I think we should step to the bench, Judge.

The Court: I am also going to make another suggestion with regard to you, Mr. Lowenberg, but I do not want to do it in front of the jury.

Mr. Lowenberg: I am sorry.

The Court: What is the relevancy of it?

Mr. Monroe: That the defendant was charging a price which entailed a profit.

The Court: I will allow it.

Mr. Lowenberg: Exemption.

Q. You were purchasing from someone other than (114) the defendant before you started purchasing from the defendant? A. Some time before that, yes.

Q. Were you paying the same price to your prior connection that you paid the defendant for the same kind of narcotics? A. Not quite.

Q. Were you paying a lower price or a higher price? A. A lower price.

Q. Were you buying in the same quantity?

Mr. Lowenberg: Objected to.

Charles Kalchinian—for Government—Cross

The Court: I will allow it.

Mr. Lowenberg: Exception.

A. Will you repeat that, please?

Q. Were you buying from your prior connection in the same quantities that you were buying from this defendant?

A. Yes, usually the same quantity.

Mr. Monroe: Thank you. You may examine.

Cross Examination by Mr. Lowenberg:

Q. Mr. Kalchinian, what do you do for a living now?

A. (No answer.)

(115) Q. Do you have to think about it? Why are you hesitating?

The Court: Now, just wait until he answers the first question. You asked him one, and the question was what do you do for a living now.

The Witness: I have entered into the field of photography. I am a photographer by profession, and I came back into it. That is what I am doing now.

Q. Where is your business? A. I am living in California, sir.

Q. California? A. Yes.

Q. What part of California? A. In Pasadena.

Q. Beg pardon? A. Pasadena, California.

Q. Selling narcotics? A. No.

Q. Would you take your coat off and roll up your sleeve?

Mr. Monroe: I object to this, if your Honor please. The defendant has answered the question.

The Court: No, I will allow it.

Charles Kalchiniqn—for Government—Cross

Q. You roll them up, both sleeves.

(116) The Court: You may stand back here.

Do you want to see the arm?

Mr. Lowenberg: I want to see it, Judge.

The Court: Yes.

Q. What are these punctures (indicating)? Aren't they from a narcotic needle? A. That is 15 years ago.

Q. That is 15 years ago? A. That is right.

Q. Will you pull up the other sleeve?

The Court: Would you want the jury to see that?

Mr. Lowenberg: Yes, Judge, I am going to do that after I examine him.

Q. You have punctures, here, too (indicating). A. Not punctures, sir, scars.

Q. What are they? A. Scars.

Q. Scars? A. That is right.

Q. Isn't that from the recent use of narcotics? A. Over—over five years ago.

Q. There is a little blister there, is there not? A. All right. Then let a doctor examine me and—

(117) The Court: No, that is not the question.

Q. I did not ask you that. A. Get a doctor and—

The Court: No.

The Witness: I do not see any there.

The Court: Just a moment. Let us stop for a minute.

Mr. Lowenberg: May I show it to the jury?

The Court: Let us stop for a moment. Will you go back to your table, please?

Charles Kalchirian—for Government—Cross

Mr. Lowenberg: Yes, but may I show it to the jury, please?

The Court: He will show it to the jury.

Mr. Lowenberg: Yes, but may I appear personally and point it out?

The Court: No, the jury may examine him.

Would you stand in front of the jury box and walk around so that the jury can see both of your arms?

Mr. Lowenberg: I will except to your Honor's refusing to allow me to point out to the jury that part of the witness' arm which is punctured and has what I call a blister.

The Court: Exhibit both of your arms to each of the jurors.

(118) The Witness: Well, I believe—

The Court: Just a moment.

The Witness: Excuse me, your Honor, but I believe that the counselor made a statement, and what he is saying—

The Court: No.

The Witness: Well, I mean the gentleman is asking me a question about that.

The Court: No, the jurors should not ask questions until you get back on the stand. And then I will let the jurors ask whatever they want.

You can walk back in the jury box and show each of the jurors.

The Witness: All right.

The Court: Has each juror had an opportunity to examine the witness' arm?

A Juror: No, sir. I would not be qualified to determine whether he is a user.

The Court: You express no desire to look?

The Juror: No, sir.

Charles Kalchinian—for Government—Cross

The Court: Now, I believe there was some question that one juror wanted to ask.

A Juror: It was the same remark, sir, not being a doctor and not qualified.

(119) The Court: And you have no desire to look?

The Juror: No.

The Court: But you have had an opportunity to look if you so desired.

The Juror: Yes, sir.

The Court: Thank you.

By Mr. Lowenberg:

Q. How many names other than Mr. Kalchinian have you used? A. Well, in the case, during the case I did use the name of James Ballow.

Q. Did you use any other name? A. Yes, I have gone in the hotel business for 14 years.

Mr. Lowenberg: I move to strike that out.

A. I have used the name of Charles Gleason.

Q. Charles Gleason? A. Yes.

Q. How many times have you been convicted for possession or use of narcotics, sir? A. I have been arrested and convicted once in my life.

Q. Once? A. Yes.

(120) Q. Was that for a sale? A. It was, as I said before, it was for the sale to one man, a package of narcotics, yes, sir.

Q. And at that time you were a night clerk in a hotel?

A. That is right. I was a night clerk and manager of the hotel.

Q. Did you have the narcotics with you while you were a clerk in the hotel? A. No, sir.

Q. And how much a week would you say that you spent on narcotics during that period? A. Various amounts, about thirty or forty dollars a week.

Q. And what was your salary during that time, your income? A. Approximately 60, 65.

Q. 60, 65? A. Yes, sir.

Q. And did you live in the hotel? A. No, I did not.

Q. Did you ever commit a theft? A. No, I did not.

Q. A larceny of any kind?

(121) The Court: Just a moment now. Counsel, I am asking you now whether you intend to prove that the witness committed a theft and a larceny?

Mr. Lowenberg: I do not. I am asking him—

The Court: No, I know you are asking him. I know what you are asking him, but I am asking you now whether in view of the questions that you asked the witness you intend to contradict him.

Mr. Lowenberg: I will answer it this way:

The man said that he earned \$60 a week and paid \$40 a week for narcotics or \$35 and—

The Court: The answer is that you are not going to offer any proof that he did commit such offenses?

Mr. Lowenberg: No. I want to know how he sustained himself.

The Court: Then you can ask him that.

Mr. Lowenberg: That is the reason.

The Court: Then you may ask him.

Q. Between your income and what your purchases of narcotics amounted to how did you sustain yourself? A. Just as many addicts have done in the past, sir.

Q. What is that? A. Just as many addicts have done in the past.

(122) Mr. Lowenberg: I move to strike that out.

Charles Kalchinian—for Government—Cross

The Court: I will allow it. That is his explanation.

The Witness: The answer is—

The Court: No, that is all right. That is your explanation as to how you did it.

Q. How did you do it? Never mind how the others did it. How did you do it? A. I borrowed—

Mr. Monroe: I object, your Honor. He answered the question.

The Court: He has asked another one.

A. I borrowed money from banks, finance companies, and money lenders.

Q. What banks did you borrow money from? A. I have borrowed \$300 from the Manufacturers Trust Company.

Q. When was that? A. Just about a year and a half or two before this incident.

Q. And you were addicted to narcotics in '51, weren't you? A. '51, yes.

Q. And it was then that you were convicted of (123) a sale of narcotics, isn't that true? A. I was charged with it, yes.

Q. And did you plead guilty? A. Yes, I did.

Q. And it was during that time that you were spending thirty and forty dollars a week for narcotics, isn't that true? A. More or less, yes.

Q. And it was at that time that you had an income of how much, 60 or 65 dollars a week? A. About that, yes.

Q. Now, what I am concerned about is your borrowing from a bank a year and a half ago. And I am now asking you—

The Court: He did not say a year and a half ago.

Charles Kalchinian—for Government—Cross

Mr. Lowenberg: That is what I understood him to say.

The Court: We will ask him again. Did you say you borrowed money from the Manufacturers Trust Company a year and a half ago?

The Witness: Yes, sir, I did.

The Court: I am sorry. I thought you said at that time you borrowed from the Manufacturers Trust (124) Company.

The Witness: I don't think so.

The Court: I am sorry.

The Witness: I don't think so.

By Mr. Lowenberg:

Q. I am asking you how you sustained yourself in 1951.

A. Just as I told you before.

Q. How? A. I borrowed money when I was short of money.

Q. Whom did you borrow it from? A. Usually money lenders, and after the Manufacturers Trust the Family Finance Company.

Q. Did you have a loan from the Manufacturers Trust in 1951? A. I believe I was paying a loan back.

Q. Are you sure of that? A. It is rather vague in my mind, but I was paying it.

Q. And how much of a loan was that? A. It was \$300.

Q. And you say you were borrowing also from a finance company, too? A. Well, after that and also before that I had (125) an account with him.

Q. You mean after that, what year? A. After '51.

Q. In '51? A. Yes.

Q. What finance company? A. Family Finance Company.

Q. And how much did you borrow from them? A. Varying amounts, 200, a hundred and fifty, and so on.

Charles Kalchinian—for Government—Cross

Q. Was that all in 1951? A. No, part of it happened—as I said, I had an account and when I finished up and needed more money I used to go to them and borrow some more money.

Q. What money lenders did you borrow from? A. Those are hard to describe. They are people in the neighborhood.

Q. How much did you borrow there? A. I borrowed 50, 60, 25, varying amounts.

Q. And this money had to be paid back, didn't it? A. Yes, and I paid it back.

Q. Did you pay it back out of the \$25 a week that you had over? A. Sometimes I had more than \$25 a week left.

(126) Q. Where did the rest of it come from? A. Sometimes from tips.

Q. From tips? A. Yes.

Q. How much did you earn in tips? A. Well, let us say another ten or fifteen dollars a week.

Q. So that you had \$35 a week, is that correct? A. Yes, depending, all depending, not always the same.

Q. And with that sum you had to feed yourself? A. Yes.

Q. And you had to pay your rent? A. Yes.

Q. And you had to clothe yourself? A. Yes.

Q. Where did the money come from to pay off all of these loans in '51, the finance company— A. The money—

Q. —to the bank and the money lenders? A. The money was not quite enough either. I neglected myself and I sacrificed on many items that I needed but that I could not afford.

Q. And you paid all this back on \$35 a week? (127) A: Well, yes, it was a small monthly payment and I could make it.

Q. Now, this arrest for the sale of narcotics to which you pleaded guilty, you were released on your recognizance without bail, weren't you? A. Yes, I was.

Q. And that was on the application of the United States

Charles Kalchinian—for Government—Cross

Attorney's office? A. Well, I don't know what you mean by that.

Q. Well, did the United States Attorney request that you be released on your recognizance without bail? A. I don't know if it was. I believe it might have been, yes.

Q. And it was because you had agreed to cooperate with the government, isn't that true? A. I can't say that, sir.

Q. Well, on the day of sentence isn't it a fact that the United States Attorney's office pointed out to the court that you were cooperating with the government and asked for a suspended sentence? A. He did tell the Judge that I had cooperated and had been useful to the government.

Q. And you decided to cooperate because you wanted to save yourself from jail, isn't that correct? (128) A. Well, I don't think so.

Q. Well, you didn't want to go to jail, did you?

The Court: Excuse me, Mr. Lowenberg, but can you and government counsel agree on the date of the arrest and the date of sentence?

Q. Well, do you remember when the—

The Court: No, just a moment. I am asking can you and Mr. Monroe agree on the day of arrest and day of sentence?

Mr. Lowenberg: I haven't got the record.

The Court: The answer is no, that you can't.

Mr. Lowenberg: Now, would you please read the last question, Mr. Reporter?

(Question read.)

Q. You did not want to go to jail, did you? A. No.

Q. And you thought the best way out was to cooperate,

Charles Kalchinian—for Government—Cross

isn't that true? A. I didn't think anything about it, the best way out, or any other way.

Q. Now, did you help in any other cases outside of this case, did you help the Bureau? A. Yes, I did.

Q. In how many cases? (129) A. At least three.

Q. Pardon me? A. At least three.

Q. And three others? A. At least three.

Q. And at least three?

The Court: Counsel wants to know if it is three others, or if the total is three.

The Witness: I would say the total is three.

The Court: The total is three?

The Witness: Yes.

The Court: All right.

Q. Now, you were up to Dr. Grossman's office for a cure, were you not? A. I went up there for a cure.

Q. And the defendant was up there for a cure, was he not? A. I saw him there.

Q. Was he up there for a cure? A. I did not know at first what he was there for.

Q. Did you find out later that he was there for a cure? A. I spoke to him outside and he told me that he was in there for a cure.

(130) Q. And that he was an addict as well as—

Mr. Monroe: I object to that and move to strike out the answer to the last question as not relevant, not binding.

The Court: I will overrule your objection.

That is what he told you, isn't it?

The Witness: That is right.

Q. As a matter of fact, you saw him frequently in Dr.

Charles Kalchinian—for Government—Cross

Grossman's office, did you not? A. I saw him from time to time, yes.

Q. And Dr. Grossman has a practice of treating addicts, has he not? A. He had been treating addicts, yes.

Q. And you met there by accident, didn't you? A. Yes.

Q. Your appointments happened to be there at the same time, isn't that correct? A. What is that, sir?

Q. Your appointments at the doctor's office happened to be at the same time? A. Sometimes it happened at the same time, but they were not arranged that way.

Q. Yes. And after you saw the defendant there how many times would you say it was before you started to (131) speak to him? A. Well, I said "Hello" to him, a word of greeting a couple of times in the office.

Q. And that was after how many times that you had seen him? A. Perhaps two or three times.

Q. Two or three times? A. Yes.

Q. And after awhile the discussion turned; did it not, between you and him as to the kind of narcotics you had been using, both of you, isn't that true? A. Outside when we spoke of it, yes.

Q. And he spoke of it, too, isn't that correct? A. Yes, he did.

Q. And then the time came when you asked him whether he could get any narcotics that you could split between you for your own use, isn't that true? A. No, it is not.

Q. Did you testify at the first trial? A. Yes.

Q. Everything you testified to there the truth? A. Yes.

Mr. Lowenberg: Will your Honor bear with me for a moment?

Q. Did you suggest to him that he obtain one-sixteenth (132) of an ounce and that you split it between you? A. Well, he offered to split it. That is what I inferred before, that I hadn't given him the idea of splitting anything.

Charles Kalchinian—for Government—Cross

He just said as long as I could pay \$25 for the amount, a small amount, he would split a package with me and I would pay him \$15 for my share of it.

Q. Didn't he suggest or you suggest that both of you split some narcotics between you? A. He suggested it and I said it was all right with me as long as I got a small amount which I could afford.

Q. And you asked him to get it, didn't you? A. I didn't ask him to get anything.

Q. You didn't ask him to get anything? A. He offered to get it for me.

Q. Didn't you the first time approach him and ask him whether he could get any stuff? A. I approached him to lead me to his connection, which would have been a better one.

Q. Didn't you approach him and ask him whether he could get any stuff? A. I had asked him if he was able to get it.

And he said he was.

(133) Q. And what did he say the first time when you asked him? A. The first time I asked him he didn't say much about the matter.

Q. As a matter of fact, he said nothing, isn't that the truth? A. Well, he was just—he just didn't answer me directly.

Q. And then you asked him another time, is that correct? A. I asked him about this particular connection.

Q. Did you ask him to get the stuff, yes or no? A. No, I didn't ask him to get the stuff right then and there.

Q. You did not? A. I asked him if he had been able to contact this man.

Q. Now I will ask you whether you testified at the previous trial, and do you remember that—

The Court: We have covered that.

Charles Kalchinian—for Government—Cross

Q. Do you remember having been asked this question and didn't you give this answer:

"Q. Did you speak to him several times about it?"

Meaning supplying narcotics. (134) "A. Two or three times.

"Q. Two or three times? A. I broached the subject to him.

"Q. And the first time he said he wasn't interested, is that right? A. No.

"Q. He said nothing, is that right? A. He just listened to me.

"Q. Just listened and said nothing, is that correct? A. Well, he talked about it. He didn't say yes or no about it."

Was that the truth? A. That is right.

Q. So you broached the subject, did you not, to get narcotics, is that right? A. I spoke to him about it, yes.

Q. You brought up the subject, did you not? A. I brought up the subject.

Q. And you brought it up to him two or three times, is that correct? A. Well, we spoke on the same subject anyway.

Q. Was this the truth, "two or three times I broached the subject to him?" A. I broached the subject to him, that is right.

(135) Q. And did you do that two or three times? A. Yes.

Q. And knowing that this defendant was at Dr. Grossman's office for a cure of narcotics, you nevertheless approached him to supply narcotics, is that the situation? A. (No answer.)

Q. Wasn't that the situation? A. Well, at first I did not know what he was going to be able to supply.

Charles Kalchinian—for Government—Cross

Q. He told you, did he? A. He told me at a later time, yes.

Q. Did he tell you before you approached him? A. Yes, he did tell me.

Q. Pardon me? A. Yes, he did tell me.

Q. So that knowing he was there for a cure to get rid of that habit, you nevertheless broached the subject to him two or three times? A. I spoke to him.

Q. To supply narcotics, is that correct? A. I spoke to him and asked him to introduce me to a man that I could deal with.

Q. Did you testify to that at the first trial? A. I believe so.

(136) Q. Are you sure now? A. Well, you can refresh my memory. It is four or five years ago.

Q. Now, the second time that you broached him, what did he say to you? A. I don't know if it was the second time or the time after that, but he said he was working on it, and that he would see what he could do to introduce me to this man.

Q. So you had in mind, did you not, Mr. Kalchinian, to keep after this defendant in order to induce him to sell you narcotics?

Mr. Monroe: I object to the question, if your Honor pleases, calling for a conclusion.

The Court: Yes. The witness seems to say, as I recall it, that he asked him three or four times to introduce him to this man; is that your testimony?

The Witness: Yes, your Honor.

The Court: All right.

Q. Three or four times did you say, Mr. Kalchinian? A. I would say so.

Charles Kalchinian—for Government—Cross

Q. Or did you ask him once? A. Ask him what, sir?

Q. To introduce you to the man. (137) A. More than once.

Q. More than once? A. Yes.

Q. Did you so testify at the previous trial? A. I believe I did.

Q. Are you sure of that now? A. I believe so.

Q. Can you swear that you did one way or the other? A. Well—

Q. You can't? A. Well, it is—

Q. Now, Mr. Witness. A. My best recollection is that I did ask him several times.

Q. You kept after the defendant by asking him what he had done about supplying narcotics, had you not? A. Not quite.

Q. Not quite? A. No.

Q. Do you remember having testified at the previous trial?

The Court: Yes, we have covered that.

Mr. Lowenberg: All right.

The Court: The witness has said on two (138) occasions that I recall, that he did testify at the previous trial.

Q. Do you remember being asked this question on the previous trial:

“Q. You didn't want him”—meaning the defendant—
“to forget that you had made a request for a supply of
narcotics, is that right? A. Well, since he had promised
to look into it, naturally I was interested to know what
he had done about it.”

The Court: Were you asked that question and
did you make that answer?

Charles Kalchinian—for Government—Cross

The Witness: I believe I did.

Q. Was that the truth? A. Yes.

Q. So that you kept after this defendant, did you not, to supply narcotics?

The Court: Counselor, the witness has made a distinction, but you still keep using the word "supply."

He said he kept after the defendant to introduce him to this man, so that I think it has been covered now.

Q. I will read you your answer again and ask you whether it was not the truth:

"A. Since he had promised to look into it"—meaning (139) the defendant—"naturally I was interested to know what he had done about it."

Is that the truth? A. Yes.

Q. Do you remember having been asked this question and having given this answer:

"Q. How many times in all did you approach him"—meaning the defendant—"to supply narcotics? A. Perhaps two or three times.

"Q. In other words, you kept after this defendant, is that correct, to supply narcotics, is that right? A. I wouldn't say I kept after him. When I met him I spoke about it. That is what I mean. He always brought up the subject. I approached him on the subject, yes, and asked him what he had done about it."

Was that the truth? A. Yes.

Q. So you approached the defendant two or three times for him to supply you, this defendant to supply you with narcotics, is that correct? A. I would not put it that way.

Charles Kalchinian—for Government—Cross

Q. Did you put it that way at the previous trial? A. It may sound like that if that is what I said.

Q. Well, I will ask you to look at it.

(140) The Court: We have covered that counselor. Let us get on to something else now.

Q. Now, did you ever discuss with the agent at the previous trial, during the previous trial, or inform the agents as to how you thought the case was going against this defendant? A. I do not understand your question, counsel.

Q. Were you interested in convicting this defendant? A. No, I wasn't.

Q. You weren't? A. No.

Q. Do you remember having been asked these questions and giving these answers:

"Q. Did you speak to anybody about this case during the recess? A. No.

"Q. Nobody at all? A. No.

"Q. Were you with the agents during the recess? A. We went for coffee, that is all, and he asked me how things were getting along. I said, 'I don't know. I think we are getting along all right.'

"Q. He asked you how things were getting along? A. He just asked me casually.

(141) "Q. You said you thought they were getting along all right."

Did you so testify? A. Mr. Counselor, the way you emphasize—

The Court: No.

Q. Did you so testify?

The Court: The only question was whether you

Charles Kalchinian—for Government—Cross

were asked those questions and did you make those answers.

The Witness: It was just a general answer, "We are doing all right," and I didn't mean anything by it.

Mr. Lowenberg: I move to strike that out, Judge, a volunteered statement on the part of this defendant.

The Court: I would appreciate it—

The Witness: I have to make myself clear on that point.

The Court: No, if you will just try to follow my suggestion—

The Witness: I am sorry.

The Court: The question was were you asked those questions and did you give those answers?

The Witness: I gave those answers.

The Court: That is the only question, and (142) please don't volunteer.

The Witness: I am sorry.

Q. Had you already received that suspended sentence?

A. Yes, a little previous to that trial.

The Court: Do you remember when you were sentenced?

The Witness: No, your Honor, I do not.

The Court: What year was it?

The Witness: It was the same year as the trial.

The Court: 1952?

The Witness: 1952.

The Court: In 1952 you were sentenced?

The Witness: Yes, your Honor.

The Court: You were arrested when?

The Witness: In 1951.

Charles Kalchinian—for Government—Cross

The Court: Do you remember what month?

The Witness: I don't remember.

The Court: Do you remember about what month in 1952 you were sentenced?

The Witness: I would say in the spring, perhaps the beginning of the year, perhaps February.

The Court: And was it before or after you had (143) testified?

The Witness: Before I testified.

The Court: Before you testified?

The Witness: No, I mean after.—I don't remember.

The Court: No. Were you sentenced by the Judge before or after you testified?

The Witness: Before.

The Court: You were sentenced by the Judge before you testified?

The Witness: Yes.

The Court: All right.

By Mr. Lowenberg:

Q. But you had made a promise, an agreement, though, to cooperate with the Federal Bureau of Narcotics before you received a suspended sentence from the court? A. I had promised to cooperate in 1951.

Q. And that was before your sentence? A. Yes, that was before my sentence.

Q. Before your sentence, is that right? A. That is right.

Mr. Lowenberg: Will your Honor bear with me for just a moment, because this is a voluminous record.

The Court: Yes.

Charles Kalchinian—for Government—Cross

(144) Q. And it was your job, was it not, while you were working with these agents to go out and try and induce somebody to sell you narcotics, isn't that true?

Mr. Monroe: I object to the question, your Honor, calling for a conclusion.

The Court: No, I will allow it.

A. No, it wasn't my job at all to do anything of the kind.

Q. Do you remember this question— A. Please read.

Q. "Q. And it was your job while working with the agents to go out and try and induce a person to sell narcotics to you, isn't that correct? A. I would say yes, that."

Do you remember that? A. If that is what I said, it stand just that way.

Q. Well, will you look at this—

The Court: He said "let it stand just that way."

The Witness: I take your word for it.

Q. Did you so testify? A. If that is the answer on it was to the best of my recollection.

(145) Q. You did— A. I believe so.

Q. —say that and it was the truth? A. Yes, sir.

Q. Pardon me? A. Yes, sir.

Q. So when you testify now that it was not your job, you are not telling the truth? A. I mean by job that nobody hired me for that. That is what I inferred, otherwise I meant the same thing in my answer to your question.

Q. Would you send an innocent man to jail?

The Court: He does not send people to jail without counsel.

Charles Katchinian—for Government—Cross

Q. I say would you?

The Court: He does not send people to jail. He does not have the power to send anybody to jail.

Q. Would you testify against an innocent man?

Mr. Monroe: Object to the question.

The Court: I will permit it.

A. Do you want me to answer that?

The Court: Yes.

Q. Yes.

The Court: Would you testify against an (146) innocent man, the question is.

The Witness: No, I would not.

Q. Do you remember this question:

“Q. Well, you would be prepared to send anybody up to help yourself, isn’t that true?”

“The Court: You mean even an innocent man?”

“Mr. Lowenberg: That is what I want to know from him, Judge.

“The Court: I see.

“Q. Isn’t that true? A. I don’t know. I don’t know how to answer you that question.”

Do you remember so testifying? A. I might have said that.

Q. You might have? A. Yes.

Q. Do you remember that? A. If it is there I must have said it.

Charles Kalchinian—for Government—Cross

Q. Do you want me to show it to you? A. No, I take your word for it.

Mr. Monroe: Will counsel please state the page when he is reading?

Mr. Lowenberg: Well, Judge, his record and my record are different.

(147) The Court: All he asked you to do was to state your pages so he could try and follow it.

Mr. Lowenberg: I will give it to him.

The Court: He asked you to state it.

Mr. Lowenberg: Judge, I have to show it to him.

The Court: No. He asked will you now state the page you were reading from. Will you state that to counsel now, that page that you just read from?

Mr. Lowenberg: Page 39.

The Court: Very well.

Mr. Lowenberg: Do you want me to show it to him?

The Court: He said if it is there he said it.

Q. Do you want to see it?

The Court: Counselor, he said if it is there he said it.

Mr. Lowenberg: May I show it to him?

The Court: You have no doubt that you said it or do you have?

The Witness: No, I don't think I have.

By Mr. Lowenberg:

Q. So, when you said if that is there "I said it," you did not want to make your answer different then, did you?

(148) A. No.

Charles Kalchinian—for Government—Cross

Q. You knew you had said it, didn't you? A. Let us allow that I did, sir.

Q. Pardon me? A. Let us allow that I did, sir.

Q. And was your sentence adjourned two or three times at the request of the United States Attorney's office? A. My sentence was—I mean my trial sentence there had not been nothing there, until then I was adjourned a couple of times as I remember.

Q. Your sentence? A. I don't know if it was the sentence or the actual trial in court.

I believe the sentence was adjourned a couple of times.

Q. Well, let us make certain. A. All right.

Q. Were you asked this question and did you give this answer:

“Q. During all of this time was the sentence being postponed from time to time, adjourned from time to time? A. It was adjourned two or three times I believe.”

Is that true? A. Yes.

(149) Q. And was that done because you were cooperating with the Federal Bureau of Narcotics? A. I couldn't tell you.

Q. You couldn't tell me that either? A. I couldn't tell you whether it was for that reason. I was told that.

The Court: He might not want that type of answer. Only answer what you are asked.

The Witness: All right, your Honor.

Q. Now, so that there will be no mistake about it, you approached this defendant several times and—

The Court: I think we have covered this, counsel.

Q. —to supply narcotics?

Charles Kalchinian—for Government—Cross

The Court: We have covered this, Mr. Lowenberg.

Mr. Lowenberg: Pardon me?

The Court: You did not hear me?

Mr. Lowenberg: I did not hear you, Judge.

The Court: I said I think we have covered this a number of times.

Mr. Lowenberg: Exception.

Q. Did the defendant tell you what his business was?

A. He only told me one thing, that he was a handyman.

(150) Q. What is that? A. He told me only one thing when I asked him what he did.

Q. He told me he was a handyman.

Q. So he told you that he was a handyman? A. That is what he told me.

Q. Now, on the first occasion how much money did you give the defendant? A. Please repeat it. I did not hear you, counsel.

Q. On the first occasion, November 1st, how much money did you give the defendant? A. I gave him—I gave the defendant \$15.

Q. \$15? A. That is right.

Q. And what did he tell you the narcotics cost? A. Well, we had discussed that before, not on that day. We had discussed that before.

I asked him what it was on that day and he did say \$15, and I gave him the \$15.

We discussed the cost previous to that.

Q. He said it would cost \$15, the entire amount? A. He said it would cost me \$15.

Q. He said it would cost you \$15? A. My share of it, that is right.

(151) Q. And you give him the \$15, is that correct? A. Correct.

Charles Kalchinian—for Government—Cross

Q. Now, do you remember testifying at the previous trial—

Mr. Monroe: If your Honor please, I request that counsel be instructed to state the page of this record that he is reading from so that I can collate this ultimately when I find it.

Mr. Lowenberg: Page 10.

Q. You asked this defendant if he could get as small an amount as one-sixteenth of an ounce, and that if he could whether he would let you have part of that one-sixteenth of an ounce?

The Court: Wait a minute. Is this the question and answer in the previous trial or what?

Mr. Lowenberg: I will read it.

The Court: You asked him if he remembered testifying at the previous trial, but it is not clear from the way you asked the question whether you were reading the question and answer from the previous trial.

Mr. Lowenberg: I will read the question and answer.

The Court: I take it that you were not doing that then.

(152) Mr. Lowenberg: No, I would rather not.

The Court: I take it you were not doing it then?

Mr. Lowenberg: No, not at that time.

The Court: Thank you.

Q. I then asked him—

Mr. Monroe: Page?

Mr. Lowenberg: Page 10.

Charles Kalchinian—for Government—Cross

Q. "I think asked him what quantity could he buy, the smallest quantity possible."

The Court: Are you reading an answer now?

Mr. Lowenberg: Yes.

The Court: What was the question?

Q. "Q. What did he have to say to that?"

Will your Honor bear with me?

Q. Do you remember having been asked these questions and giving these answers—

The Court: Now you are reading from page?

Mr. Lowenberg: Page 8.

The Court: Very well.

Q. "Q. Did you meet the defendant on any other occasions on the street and have conversations with him? A. Yes, we met not regularly but sometimes at the hours when we both were in the pharmacy together, or (153) coming out of the pharmacy. We rode the bus due west; of course 49th Street is the terminus of the bus, going on to 49th Street, and we rode the bus once or twice, and once or twice we did walk westward on 49th Street.

"Q. In any of these conversations did either you or the defendant mention any narcotics other than the narcotics used in the treatment which you were taking at that time?

A. Yes, your Honor, I asked him what his experiences had been when he was using narcotics.

And he told me.

And I asked him then where he had been getting it, and the quantity of narcotics he had been purchasing at the time.

And he told me."

Do you remember so testifying? A. Yes.

Charles Kalchinian—for Government—Cross

"Q. What did he say to that? A. He answered to me, he said that the man was giving up his business, he was about to give up his business and turn it over to smaller operators, he himself was either going away—I don't recall that.

I then asked him what quantity could he buy, the smallest quantity possible.

(154) And he said he could get as small an amount as one-sixteenth of an ounce.

I asked him could he purchase an amount like that, I myself did not have any use for that amount, but could he purchase any amount like that.

He said he could. He said he could take it, part of it himself and let me have part of that one-sixteenth of an ounce, that I could purchase from him directly.

"Q. Did you give him any answer? A. I asked him to try and do that, and asked him if I could get in touch with him.

He did not encourage me. He didn't tell me. He said he would call me, and I gave him my phone number where I was employed and he promised to call me there."

Do you remember having so testified? A. Yes, sir.

Q. Now, that conversation had taken place after you approached this defendant how many times? A. I can't recall, sir. I may have seen him outside several times. It probably was during one of those walks or bus rides.

Q. Had you broached the subject of narcotics before this conversation? A. We had spoken of addiction and so on in general.

(155) Q. Did you broach the subject to him about buying narcotics? A. I had asked him if he knew a connection that I could meet.

Q. Did you broach the subject to him about selling you narcotics, yes or no?

Charles Kalchinian—for Government—Cross

Mr. Monroe: If your Honor please, this has been gone over several times.

A. Not to sell me.

Q. Pardon? A. Not to sell me, to introduce me to the connection.

Q. Do you remember—

Mr. Lowenberg: Page 11.

Q. —having been asked this question and did you give this answer or these answers:

“Q. What happened at that time? A. We started to walk on 21st Street, and I asked him whether he had the narcotics.

He said he did, and he told me then that he had, he was giving me about half of what he had bought.

I asked him the price.

He said he paid \$25 and it would cost me \$15, and that I had to give him \$15.

I did give him the \$15.”

(156) You so testified? A. Yes.

Q. Is that the truth? A. Yes.

“Q. Did he tell you why you had to pay him the \$15? A. Well, he said there were taxi expenses and so on, his trouble and so on, and it was worth \$15, and for me to give him the \$15.”

Is that right? A. Yes.

Q. So there was a split between you of these narcotics, is that correct? A. All I know is just what he gave me. I don't know what he did with it. I got my share of it and I gave him \$15. That much I can tell you.

Q. And that was for his own use and for your use, isn't that the truth?

Charles Kalchinian—for Government—Cross

The Court: He said he did not know what he did with it, counselor, he did not know what he did with his.

Q. You did not know what he did with his? A. No.

Mr. Lowenberg: Will your Honor bear with me?

A Juror: Your Honor, could I be excused for (157) a moment?

The Court: We will have a recess right now.

The Juror: Thank you.

The Court: The reason I did not give a recess earlier is that we waited 20 minutes for a juror, and I don't know which juror it was, and I do not want to ask.

The Juror: Me.

The Court: Was it yourself?

The Juror: Yes, sir.

The Court: We will have a recess now.
(Short recess.)

Q. Mr. Kalchinian, do you remember having been asked these questions and having given these answers—

The Court: Page?

Mr. Lowenberg: Page 8.

By the Court:

“Q. After the second or third time at the office? A. Outside, your Honor.”

“Q. That would make it what, about eight times you had seen him?”—meaning the defendant—“A. After the first time..

“Q. Just about? A. What was the gist of the conversation?

Charles Kalchinian—for Government—Cross

(158) "The Witness: About the latter part of August.

"The Court: The latter part of August you say you had a conversation. What did you talk about?

"The Witness: It was just general conversation. He would ask me how I was getting along on my treatment and I asked the same question and we were discussing the treatment.

"Q. What treatment were you taking? A. We were taking a withdrawal treatment by this Dr. Grossman, your Honor, a reduction treatment with the new synthetic drug which had been used in Lexington at the United States Public Hospital."

Do you remember having so testified? A. Yes, sir.

Q. So that despite the fact that the defendant said to you that he was there for treatment, you even discussed, the two of you, the treatment that you were taking? A. That is right.

Q. And the kind of drugs that you used, isn't that true? A. That is true.

Q. Do you remember having been asked this question and did you give this answer?

(159) The Court: Page?

Mr. Lowenberg: Page 11.

"Q. What happened at that time? A. We started to walk on 21st Street,"—meaning you and the defendant—"and I asked him whether he had the narcotics.

He said he did, and he told me then that he had, he was giving me about half of what he had bought.

I asked him the price.

He said \$25, and it cost me \$15."

Is that right? A. Yes.

Charles Kalchinian—for Government—Cross

Q. Did you so testify? A. Yes.

Q. Do you remember having been asked this question and did you give this answer—

The Court: Page?

Mr. Lowenberg: Pages 31-32.

“Q. Did you make that promise after you were arrested and charged with the sale of narcotics? A. Yes, sir.

“Q. And you did that because you felt that you could help yourself, is that correct? A. In a way, yes.

(160) “Q. You didn’t want to go to jail, did you? Is that correct? A. No, sir.”

Do you remember having testified that way? A. Yes, sir.

Q. Do you remember having been asked this question and did you give this answer—

Mr. Lowenberg: Page 48.

“Q. That is right, and knowing that he”—meaning the defendant—“was there for the treatment of narcotic addiction, to get away from the habit, you nevertheless broached the subject to him as to where he could get narcotics from, is that correct, yes or no? A. I approached him on the subject, yes.”

Is that the truth? A. Correct.

Q. Did you so testify? A. Yes, sir.

Q. Did you remember having been asked these questions and giving these answers:

“Q. Did you speak to him”—meaning the defendant—

Mr. Lowenberg: Page 51.

Charles Kalchinian—for Government—Cross

Q. —“several times about it, Mr. Kalchinian? (161)
A. Two or three times.

“Q. Two or three times? A. I broached the subject to him.

“Q. And the first time he said he wasn't interested, is that right? A. No.

“Q. He said nothing, is that right? A. He just listened to me.

“Q. Just listened and said nothing, is that correct? A. Well, he talked about it. He didn't say yes or no about it.”

The Court: Wasn't this read before, Mr. Lowenberg?

Mr. Lowenberg: Pardon?

The Court: Wasn't this read before?

Mr. Lowenberg: No, I have not read that, not to my recollection. If I am repeating it, I am sorry, but I don't think I have.

The Court: Well, the purpose of reading the testimony in the prior trial is to permit you either to refresh the witness' recollection or to contradict him, and I suggest to you that you develop whatever you want, and develop it by asking him the direct question, and that is if you think he is contradicting himself, (162) otherwise I do not think that the answers that he gave in the prior trial are very material.

Q. The first time you broached the subject to the defendant, did he say anything to you? A. What subject are you referring to?

Q. Narcotics; you know what subject I mean.

The Court: Do not argue.

Charles Kalchinian—for Government—Cross

A. No, I do not.

The Court: Do not argue with the witness, please.

Q. I mean you know the subject I mean. A. I wish you would specify what you mean by "subject."

Q. I am talking about narcotics. A. All right.

Q. The first time you broached the subject to him, did he say anything? A. He talked to me about it.

Q. What did he say? A. I can't recollect now, but we talked about that.

Q. You can't recollect? A. We didn't talk much else.

Q. You can't recollect now? A. Well, no, not his exact words, no.

Q. Well, give it to me in substance. (163) A. Well, in substance I just asked him several things, and he was evasive about it. He didn't say yes or no, as you read awhile ago.

Q. And the second time you approached him? A. Well, he was a little more tractable at that time.

Q. A little more what? A. Tractable.

The Court: Tractable, counselor?

The Witness: A little more—well, a little more willing to talk about it, but he said he was working on it and seeing what he could do about it.

Q. Do you remember having been asked these questions and giving these answers:

"Q. The second time he"—meaning the defendant—"did not say yes or no, isn't that right? A. I can't say that he did or he didn't, sir.

"Q. You can't say? A. No, because we both talked on the subject, so there was nothing to say yes or no about

Charles Kalchinian—for Government—Cross

since I hadn't asked him to get anything. We were just talking about dealers and treatment and addiction and so on."

Do you remember having testified that way? A. Yes.

(164) Q. And the second time what did he say to you when you approached him on the subject? A. You just read that I believe, didn't you?

Q. Do you remember having been asked this question—
A. Whether it was the second or third time I can't say for certain.

Q. What? A. I can't say for certain whether it was the second time or third time, but we spoke continually on the subject.

Q. How many times in all did you broach the subject to the defendant? A. Two or three times.

Q. Two or three times? A. Yes.

Q. Was it the last time that he said he was working on it? A. Well, he told me—I don't know if it was the second or third time. However, it is all inside of a few days.

Q. And you broached the subject to this defendant, did you not, for the purpose of making a case against him?

A. For the purpose of what?

Q. Making a case against him. (165) A. No, sir.

Q. You were in collaboration with the Bureau of Narcotics, were you not? A. Not at that time.

Q. Were you during any of the time that you approached him, this defendant? A. Before that, I mean a few months previous to that on other cases, yes.

Q. Did you ever speak to the Bureau of Narcotics about this defendant? A. I did—

Q. —before the day of the arrest? A. I did in the latter part of the month of October, yes.

Q. And it was your object, was it not, to build up a case against this defendant? A. It wasn't my object, no.

Charles Kalchinian—for Government—Cross

Q. Was it your object to cause his arrest? A. No.

Q. And you reported it to the Federal Bureau of Narcotics? A. I did report it, yes.

Q. And you took suggestions from them as to how to approach this defendant, did you not? (166) A. They made suggestions, yes.

Q. They made suggestions to you? A. Yes.

Q. And that was all done to cause the arrest of this defendant, was it not? A. I can't say.

Q. You know that to be so, don't you? A. If that happened.

Q. Well, you know it happened, don't you? A. Yes, I do know it happened, yes.

Q. And that was all done by you for the purpose of causing the arrest of this defendant? A. I wouldn't say that.

Q. Well, when you went to the Bureau of Narcotics they drove you uptown, didn't they? A. Yes, ultimately they did.

Q. They did? A. Yes.

Q. And that was for the purpose of obtaining evidence, wasn't it? A. I guess so.

Q. You know that, don't you? A. It is just a guess that they were.

Q. And that was for the purpose of obtaining (167) to prosecute this defendant? A. I didn't know what the purpose was.

Q. Well, did you think that they were taking you up there for a joy ride? A. I would not like to answer that question.

Q. Pardon me? A. I would not like to answer that question.

Q. They had told you to have a newspaper with you? A. That factor, yes.

Q. What? A. Then they suggested, after we did have an agreement they suggested I do that.

Charles Kalchinian—for Government—Cross

Q. And up to the time that they suggested you do that, you were getting him, building up this defendant in order to make him a subject of arrest for the Bureau of Narcotics? A. I wasn't building up anything.

Q. Well, you breached, approached him to supply narcotics, yes or no? A. When I approached him on the subject I had nothing in my mind but to supply myself.

Q. To supply yourself? A. To supply myself with narcotics, that is right. I needed it.

(168) Q. You needed it? A. That is right.

Q. And you approached him for it? A. I asked him to introduce me to his man.

Q. Where were you getting the narcotics before you asked him? A. Some weeks before from another dealer.

Q. Did you cause his arrest? A. No.

Q. Would you give me the name of that dealer? A. No. I don't know if I know it, his right name.

Q. Give me the name as you knew him under? A. Nick.

Q. Nick? A. That is all I knew him.

Q. Did you give the Bureau of Narcotics his name, Nick's name? A. I did not mention it to the Narcotics Bureau.

Q. Did you give them a description of the man? A. No.

Q. Were you cooperating with the Bureau of Narcotics at that time? A. Not at that particular time.

Q. Pardon me? (169) A. Not at that particular time.

Q. Did you subsequently when you started to cooperate with them, were you still getting narcotics from Nick? A. No.

Q. Whom were you getting it from then? A. I was not getting it from anyone.

Q. You mean you were up at the doctor's office for cure— A. That is right.

Charles Kalchinian—for Government—Cross

Q. —and you did not have any craving for narcotics while you were undergoing this cure? A. Not in the beginning.

Q. Not at the beginning? A. No.

Q. It was only in later treatment that you acquired this habit? A. I was not responding to the treatment very well.

Q. I see. Well, you did not look for Nick to supply you with narcotics? A. No, I did not.

Q. Do you know where Nick is? A. No, I do not.

Q. Did you at any time since you started to (170) cooperate with the Bureau of Narcotics give to any agent the name of Nick and a description of Nick, and where you used to meet him? A. They did not ask me and I did not tell them.

Q. Did you volunteer it? A. No, I did not volunteer it.

Q. But you did built up two other cases? A. In some months previously, yes.

Q. Some months previously? A. Yes.

Q. And isn't it a fact that not going there to Nick, but in approaching this defendant you had in mind building up a case against this defendant to give to the Bureau of Narcotics? A. No, sir.

Q. No? A. No.

Q. Do you owe Nick anything? A. No, I don't owe anyone anything.

Q. Are you on friendly terms with him? A. I do not see him. I don't know what has happened to him.

Q. You don't know what happened to him? A. No.

(171) Q. When was the last time you saw him? A. I forget.

Q. Will you tell us or mention the time approximately? A. The early part of '51.

Q. The early part of '51? A. Yes, I imagine so, about that winter.

Charles Kalchinian—for Government—Cross

Q. Were you using narcotics in '52? A. In '52 just about—what time of the year would you say?

Q. Any part of the year. A. In 1952, no.

Q. You were not? A. No.

Q. Did you go through another cure outside of the one that you attempted to get at Dr. Grossman? A. Yes, I did.

Q. Where? A. Nowhere; I took it myself.

Q. You took it yourself? A. That is right. I got off the narcotics on my own, and I don't—

Q. You got off on your own? A. Yes, sir.

Q. About how many days a week did you use narcotics (172) before you got off it on your own? A. Not very long.

Q. Pardon me? A. Not very long.

Q. How many days a week would you use it? A. I couldn't tell you that.

Q. You couldn't tell us that either? A. Not very well. It would not make much sense. You would have to understand the habit to see what it is.

Q. I am asking you whether it makes much sense or not. A. If you want some drug in order to do away with physical pain you take it.

Q. I see. A. You don't take it two or three times; you just take it always.

Q. Did you have physical pain? A. Always.

Q. Since 1950? A. Oh, not much, no.

Q. Not much? A. No.

Q. Did you ever take it? A. Take what?

(173) Q. Drugs, narcotics. A. Yes, I did take it.

Q. Since 1952? A. Yes.

Q. And where did you get it? Must you think? A. I am trying to think, small dealers. I may have went there or they might have contacted me.

Q. What? A. I may have bought once or twice from

Charles Kalchinian—for Government—Cross

an ambulatory dealer. I did not want enough to go there a second time.

Q. How much did you pay for it? A. I usually paid \$10.

Q. Pardon me? A. I usually bought a \$10 package.

Q. And who were these people? A. That is all I can tell you. I never did know them before.

Q. You mean you just walked up to somebody on the street and said "Give me \$10 worth of narcotics" and he handed it to you? Is that what you want the jury to understand? A. No, it would be someone who said see so and so, and he would find me.

Q. Who is the one that said "See so and so"? (174) A. I can't tell you. I don't remember names. They were former addicts. It would not help you in any way for me to remember.

Mr. Monroe: If your Honor please, I object to this line of questioning. It has gone away beyond the direct examination.

The Court: I will allow it.

Mr. Lowenberg: I think it goes to his credibility, Judge.

The Court: I said I will allow it.

Q. How often would you see these dealers? A. Not very often. I was trying to finally cure myself, and I only contacted or tried to see somebody when I actually needed something.

Q. How often would that be? A. Not very often.

Q. When you say "Not very often" what does that mean? A. Once a week, or two or three times a month.

Q. So you would see these dealers once a week, is that right? A. Yes.

Q. Give me the name of the dealer. A. I could not tell

Charles Kalchinian—for Government—Cross

you the name of the dealer because I didn't know the name of the dealer myself.

(175) Q. Tell me what he looks like. A. Small and secretive and always running.

Q. Did you report that to the Bureau of Narcotics? A. Beg pardon?

Q. Did you report that to the Bureau of Narcotics? A. No.

Q. Pardon? A. No, sir.

Q. When did you quit using narcotics then? A. I beg your pardon, sir?

Q. When did you quit using narcotics then? A. Just about the beginning of that year, 1952.

Q. 1952? A. Yes.

Q. Did you use it the latter part of '52? A. No.

Q. '53? A. No.

Q. '54? A. No.

Q. What happened? Did you see those dealers during the years '52 and '53? A. No. They came along but didn't always—

Q. I asked you whether you saw them? (176) A. No, did not.

Q. Pardon me? A. No, I did not.

Q. Did you frequent the neighborhood where they came from? A. I did not frequent it. I used to work in that neighborhood practically.

Q. What neighborhood was that? A. The Times Square section, 46th Street.

Q. 40 what street? A. 46th Street and Eighth Avenue.

Q. And where would you meet them, on the street? A. Sometimes.

Q. And other times? A. Sometimes, wherever I happened to chance to meet them farther uptown.

Q. Where farther uptown? A. In the 50s.

Q. Meet them on the street? A. Yes.

Charles Kalchinian—for Government—Cross

Q. How would they hand you the package? A. I would follow them, and that is usually the way it is done.

Q. I see. Did they hand you the package in (177) the street? A. Sometimes in a hallway, a doorway, or so.

Q. Sometimes? A. Yes.

Q. How would you contact them? A. I would see them come down the street. I would look for them and if I saw them I would approach them.

Q. They had no telephone? A. No.

Q. Do you remember having been asked this question—

The Court: Are you introducing this for the purpose of contradicting what he just said?

Mr. Lowenberg: All right. I will ask the question first.

Mr. Monroe: What page?

Mr. Lowenberg: Pages 53 and 54.

Q. You were interested at all times, or were you interested at all times in finding out what the defendant had done about obtaining these narcotics for you and him?

A. Will you ask that again, please?

Q. Were you interested in finding out—did you keep after the defendant to find out what he had done?

(178) Mr. Monroe: If your Honor please, counsel covered this territory before.

The Court: Well, I will let him ask it.

Q. Did you keep after this defendant to find out what he had done about obtaining the narcotics for you and him? A. I asked him what he had done about that connection, yes.

Q. How many times? A. Two or three times.

The Court: You have covered that before.

Charles Kalchinian—for Government—Cross

Q. Are you sure? A. Yes.

Q. Did you ask him about the connection or about the supply of narcotics? Which was it?

The Court: You have covered that, counsel.

Q. Which was it?

The Court: I said you have covered it, counsel.

Mr. Lowenberg: Oh, I am sorry, Judge, if your Honor will just bear with me for one minute, as I am almost finished now.

The Court: All right.

Q. Do you know—did the defendant say anything (179) to you about narcotics that he would buy that would be split up between you and him?

The Court: You have covered that I think.

Mr. Lowenberg: I don't think I have.

The Court: I think you have. All right, next question.

Mr. Lowenberg: All right, exception. I am finished.

The Court: Do you have any redirect at all?

Mr. Monroe: If your Honor pleases, I would like to have the redirect after the recess.

The Court: Is it going to be lengthy?

Mr. Monroe: I don't anticipate it will be lengthy.

The Court: We have six minutes left.

Mr. Monroe: But I have been trying to collate Mr. Lowenberg's record with my own.

The Court: All right. We will take our luncheon recess now madame and gentlemen of the jury until 2:10.

(Recess until 2:10 P.M.)

Charles Kalchinian—for Government—Cross

(180)

AFTERNOON SESSION

2:10 P.M.

CHARLES KALCHINIAN, resumed the stand.

Mr. Lowenberg: Judge, I just have two or three more questions of this witness and I will be through with him.

The Court: All right.

Cross Examination by Mr. Lowenberg (Continued):

Q. Mr. Kalchinian, I believe you testified this morning that the only way you knew that this defendant was in Dr. Grossman's office for a cure was because he had told you, and you had discussed the treatment that you were receiving? A. Yes.

Q. Is that correct? A. That is correct.

Q. Did you ever go together with him to the pharmacy to have your prescriptions filled that Dr. Grossman had made out? A. We didn't go together, but we met there occasionally.

Q. You didn't go together? A. No.

Q. Do you remember having been asked this (181) question—

Mr. Monroe: Page, please?

Mr. Lowenberg: Page 7.

“Q. When was the first time you met him on the outside? A. Perhaps after a dozen times that I had seen him in the office. We used to have our prescriptions filled about a block or a block and a half away from the physician's office on First Avenue, and I met him outside at First Avenue and saw him.”

Charles Kalchinian—for Government—Redirect

A. That is right.

Q. Did you so testify? A. Yes.

Q. So aside from the defendant telling you that he was there for treatment and discussing the treatment that he was receiving, you knew that he was going to this pharmacy to have the prescriptions filled, to have his prescriptions filled? A. To have his prescriptions filled there yes.

Q. Pardon me? A. He had his prescriptions filled there also, yes.

Mr. Lowenberg: That is all.

(182) *Redirect Examination by Mr. Monroe:*

Q. Mr. Kalchinian, in cross examination the following question and answer was read to you and you were asked if you had previously testified in accordance with that question and answer by Mr. Lowenberg—

Mr. Monroe: This is page 43.

“Q. But you would be prepared to send anybody up to help yourself, isn’t that true?”

“The Court: You mean even an innocent man?”

“Mr. Lowenberg: That is what I want to know from him, Judge.

“The Court: I see.

“Q. Isn’t that true? A. I don’t know. I don’t know how to answer that question.”

And that is where the cross examination this morning stopped.

Now I ask you this, if on the prior trial the following questions were asked of you and did you give these answers:

Charles Kalchinian—for Government—Redirect

"Q. You mean you hesitate?

"The Court: You mean you hesitate? Would you send an innocent man away?

"The Witness: Well, no, if that is what you (183) want to imply in the question.

"Q. Pardon me. A. Well, no, if that is what you imply in the question.

"The Court: Well, you said you don't know. You didn't listen to the question.

"The Witness: Well, let him rephrase the question, I am sorry, I didn't catch the question.

"Q. Did you understand my question? A. I am sorry.

"Q. Did you understand my question?

"The Court: He said no.

"The Witness: I will try to.

"Q. Do you remember the Court asked you this question, rephrasing it. A. His Honor asked me if I would be willing to see an innocent man sentenced. The answer is no, of course not.

"Q. Would you send up an innocent man?

"The Court: What do you mean by 'send up'?

"Mr. Lowenberg: I mean frame him.

"A. I wouldn't want to frame anyone.

"Q. You would not want to but would you frame an innocent man? (184) A. No, sir.

"Q. Not to help yourself? A. —"

Mr. Monroe: And the record shows parenthetically that the witness shakes his head.

"Q. You mean you would rather go to jail than frame an innocent man? A. I would not frame an innocent man.

Michael J. Reynolds—for Government—Direct

"Q. I mean there is no question about that? A. That is the way I feel.

"Q. Before you hesitated. A. I didn't understand your question.

"Q. Are you sure you didn't understand my question? A. I am sorry.

"Q. What is that? A. I am sorry that I didn't understand your question.

"Q. You didn't understand my question or his Honor's question? A. I understood his Honor's question when he spoke to me."

Do you recall that testimony, those questions and those answers? A. Yes, sir, I do.

(185) Mr. Monroe: Thank you. I have no further questions.

Mr. Lowenberg: I have no further questions.

The Court: All right, thank you. You are excused.

(Witness excused.)

Mr. Monroe: I will call Michael Reynolds, please.

MICHAEL J. REYNOLDS, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Monroe:

Q. Mr. Reynolds, what is your occupation? A. Narcotic agent, U. S. Treasury Department.

Q. What is the nature of your duties as such narcotic agent? A. I am charged with the handling of doctors,

Michael J. Reynolds—for Government—Direct

drug stores, pharmacies, and the receiving and sending of surrendered and seized drugs to the Drug Disposal Committee at Washington, D. C.

Q. Pursuant to those duties of yours of receiving and sending confiscated and surrendered drugs to the Drug Disposal Committee, do you prepare a schedule of the (186) drugs which you are so sending? A. We do.

Mr. Monroe: Government Exhibit 6 for identification.

(Marked Government Exhibit 6 for identification.)

Q. Mr. Reynolds, I show you Government Exhibit 6 for identification, and I ask you if that is such schedule as you have referred to? A. It is.

Q. Does that schedule show the bill of lading by which the particular parcels described are shipped? A. This is a schedule of the drugs shipped to the Drug Disposal Committee of District, New York 2, bill of lading No. T204085, and it is dated August 28, 1953.

Q. Does that bill of lading number appear on the schedule? A. It does.

Q. Is this document a record regularly maintained by the Bureau of Narcotics? A. It is.

Q. In the regular course of its business? A. It is.

(Mr. Monroe hands document to Mr. Lowenberg.)

Mr. Lowenberg: Are you offering it?

(187) Mr. Monroe: Yes.

Mr. Lowenberg: May I ask a couple of questions on the voir dire, Judge?

The Court: Yes.

Michael J. Reynolds—for Government—Preliminary Cross

Preliminary Cross Examination by Mr. Lowenberg:

Q. Did you prepare this schedule yourself? A. No, I did not, sir.

Q. And just what is your capacity as a narcotic agent?
A. At the present time?

Q. Yes. A. The receiving of surrendered drugs and seized drugs, checking up drug stores, doctors, hospitals, and the sending of those drugs to the Drug Disposal Committee at Washington, D. C.

Q. And were these your duties in 1953? A. It was not, sir.

Q. What were your duties in 1953? A. I was working on the street.

Q. You were working on the street? A. Yes.

Mr. Lowenberg: I object to it, if your Honor pleases.

The Court: Overruled, received as Exhibit 6.
(188) Mr. Lowenberg: Exception.

(Government Exhibit 6 for identification received in evidence.)

Mr. Monroe: Government Exhibit 7 for identification.

(Marked Government Exhibit 7 for identification.)

By Mr. Monroe:

Q. Mr. Reynolds, I show you Government Exhibit 7 for identification, and I ask you what that is, please? A. This is the United States Government bill of lading No. T204085, showing a shipment made to the Commissioner

Michael J. Reynolds—for Government—Preliminary Cross
 of Narcotics, attention of the Drug Disposal Committee,
 Bureau of Engraving and Printing, Annex, 14 and D
 Street Southwest, Washington, D. C., calling for—

Mr. Lowenberg: I object to that, if your Honor
 pleases—

The Court: Sustained.

Mr. Lowenberg: —reading from a document not
 in evidence.

The Court: Sustained.

Q. Is that a record maintained by your office in the
 regular course of business? A. It is, sir.

(189) Mr. Lowenberg: May I examine him on
 this?

The Court: Yes.

Preliminary Cross Examination by Mr. Lowenberg:

Q. I will ask you the same questions, Mr. Reynolds.
 In 1953 you were a field man; is that right? A. That is
 correct, sir.

Q. And you had no control over these records? A. I
 did not.

Q. What is your job now did you say? A. The receiv-
 ing of surrendered and seized drugs, checking on the
 druggists, doctors, hospitals.

Q. Well, would you have supervision over these papers?
 A. These particular papers?

Q. Yes. A. No, sir, I did not.

Q. You would not? A. No, sir.

Mr. Lowenberg: I see. Objection.

The Court: The question is do you have super-
 vision today?

Cecil E. Nickell—for Government—Direct

The Witness: I do. I thought he said did you have supervision.

Q. When did you first acquire supervision over (190) these papers? A. A year ago in May.

Q. A year ago? A. That is correct.

Mr. Lowenberg: Same objection, if your Honor pleases.

The Court: Same ruling, Exhibit 7 received.

(Government Exhibit 7 for identification received in evidence.)

Mr. Monroe: I have no further questions.

Mr. Lowenberg: I have no questions.

(Witness excused.)

Mr. Monroe: Would you call Mr. Nickell.

CECIL E. NICKELL, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Monroe:

Q. Mr. Nickell, what is your occupation? A. Narcotic agent, U. S. Bureau of Narcotics.

Q. What is the nature of your duties as such narcotic agent? A. My duties right now are as a member of the (191) Drug Disposal Committee, assigned to Washington, D. C.

Q. And what is the function of that committee? A.

Cecil E. Nickell—for Government—Direct

That is to receive, check, handle and dispose of narcotic drugs in cases that have been closed, or also drugs that are surrendered by registrants.

Mr. Monroe: Government Exhibit 8.

(Marked Government Exhibit 8 for identification.)

Q. Mr. Nickell, I show you Government Exhibit 8 for identification, and I ask you what that is? A. This is a record of drug shipments, the receipt of drug shipments from the various districts.

Q. I show you Government Exhibit 7 in Evidence and I ask you if the receipt of the shipment referred to in Exhibit 7 is shown on Exhibit 8 for identification? A. Yes, it is shown here. The date received is September 1, 1953, from the District Supervisor and—

Mr. Lowenberg: I object to the witness reading it, Judge.

The Court: The question was to show the receipt of the drugs mentioned in Exhibit 7.

The Witness: Yes.

The Court: You said yes?

The Witness: Yes, it does.

The Court: Thank you.

(192) Q. Is Government Exhibit 8 for identification a record regularly maintained by you in the course of business? A. Yes, sir, it is.

(Mr. Monroe hands document to Mr. Lowenberg.)

Mr. Lowenberg: May I just ask a couple of questions, Judge, on the voir dire?

Cecil E. Nickell—for Government—Preliminary Cross

The Court: Yes.

Preliminary Cross Examination by Mr. Lowenberg:

Q. Just what are your particular duties, Mr. Nickell?

A. We are a committee of two. I am a member of that committee and I receive the narcotic drug shipments, open them and examine them, check them, weigh them against the record, and then dispose of them.

Q. And these records of drug shipments, are they kept in your office? A. Yes, they are.

Q. And you have supervision over them? A. Yes, sir.

Q. Pardon me? A. Yes, sir.

Mr. Lowenberg: I still object on the ground that a proper foundation has not been laid.

(193) The Court: I will allow it.

(Government Exhibit 8 for identification received in evidence.)

Mr. Monroe: Government Exhibit 9 for identification.

(Marked Government Exhibit 9 for identification.)

By Mr. Monroe:

Q. Mr. Nickell, I show you Government Exhibit 9 for identification, and I ask you what that is? A. That is a schedule of drugs shipped to the Drug Disposal Committee.

Q. Where do you get that from when you receive such?

A. This schedule is on the inside of the box of drugs.

Q. Does that particular schedule bear any relationship

Cecil E. Nickell—for Government—Preliminary Cross

to any item shown on Government Exhibit 8 in evidence?
A. Yes, it has a box No. A24-951, which is the same as shown on this Exhibit 8.

Q. Is Government Exhibit 9 for identification a document regularly maintained by you in the regular course of business? A. Yes, it is.

(Mr. Monroe hands document to Mr. Lowenberg.)

(194) *Preliminary Cross Examination by Mr. Lowenberg:*

Q. This schedule, Mr. Nickell, do you know who prepared it? A. Do I know who prepared this?

Q. Who prepares it? A. That is prepared in the District Supervisor's office in the field.

Q. Where? A. Wherever this District Supervisor's office is located.

Q. And the drugs were sent from this district? A. Yes.

Q. To Washington? A. Yes.

Q. It would be prepared in this district, is that correct? A. That is right.

Q. And did you check this schedule? A. Yes, I did.

Q. When did you check it? A. On September 15, 1953.

Q. 1953? A. Yes.

Q. Do you check every schedule that comes into (195) your office? A. Yes, I do.

Q. Do you personally do that? A. Yes, and I sign it at the bottom.

Mr. Lowenberg: Same objection, Judge.

The Court: Same ruling.

(Government Exhibit 9 for identification received in evidence.)

Cecil E. Nickell—for Government—Direct

Mr. Monroe: Government Exhibit 2-C.

(Marked Government Exhibit 2-C for identification.)

Mr. Monroe: 3-C.

(Marked Government Exhibit 3-C for identification.)

Mr. Monroe: And 4-C.

(Marked Government Exhibit 4-C for identification.)

By Mr. Monroe:

Q. Mr. Nickell, I show you Government Exhibits 2-C, 3-C and 4-C for identification, and I ask you what those are? A. These are copies of form 117 on which are listed the three exhibits of narcotic drugs being purchased in this case, New York 8674.

(196) Q. How did you come into possession of those documents, Mr. Nickell? A. These Forms 117 are attached to the evidence envelope which contains the drug evidence when it is received in the shipment just previously identified.

Q. Do you make any notation on Form 117? A. Yes, sir, I make a notation on the front here of the weight, and also a certificate is placed on the back, and my name is signed to it.

Q. Are Exhibits 2-C, 3-C and 4-C records maintained by you in the regular course of your business? A. Yes, they are.

(Mr. Monroe hands documents to Mr. Lowenberg.)

Cecil E. Nickell—for Government—Preliminary Cross

Mr. Lowenberg: Are you offering them now?

Mr. Monroe: Yes.

Mr. Lowenberg: I just have a couple of questions, Judge.

Preliminary Cross Examination by Mr. Lowenberg:

Q. You prepared the contents of these reports yourself?

A. No, I put the notation on there, the contemporary notation of the weight.

Q. But as to the rest of the contents that was (197) typed in, do you do that yourself? A. No, that is already on the Form 117 when it is received with the bill.

Q. When you receive it, is that correct? A. That is right.

Q. So that you wouldn't know of your own knowledge whether the contents of this report as typed in is accurate or not, would you? A. The weight I would know.

Q. Yes? A. Because we weigh them again and write that weight as shown on each form there in pencil.

Q. I see. And as to the substance found would you know that? A. No, sir.

Q. You would not know that to be true either, would you? A. No, sir. We do not make the analysis.

Q. You do not make the analysis at all? A. No.

Q. Is that right? A. No, that is right.

Q. So that you wouldn't know of your own knowledge whether it was the narcotic drugs that had been sent or not? (198) A. The only thing I do know is that the evidence envelope is sealed when we received it.

Q. I understand, but you would not be prepared to testify that any substance delivered to you could be a narcotic drug? A. No, sir.

Mr. Lowenberg: I object to it, if your Honor pleases.

Cecil E. Nickell—for Government—Preliminary Cross

The Court: Well, are these copies of the other exhibits in evidence?

Mr. Monroe: Yes, your Honor.

The Court: All right. I will receive them.

Mr. Lowenberg: Exception.

(Government Exhibits 2-C for identification, 3-C for identification and 4-C for identification received in evidence.)

Mr. Monroe: I have no further questions, sir.

Mr. Lowenberg: I have no questions.

The Court: You are excused.

The Witness: Thank you.

(Witness excused.)

Mr. Monroe: If your Honor please, at this time the Government has an offer of proof with respect to which I understand the defendant will make some (199) objection.

The Court: I am familiar with it, so go on with your case.

Mr. Monroe: If your Honor please, the Government has requested the clerk of the court to requisition the file—

The Court: If you have sent for it ask the clerk if he has it.

Mr. Monroe: Do you have the file of judgment record in C112-103, C124-58?

The Clerk: Yes, sir.

Mr. Monroe: If your Honor pleases, perhaps I had beter mark it for identification.

The Clerk: They will have to bee deemed marked. You can't mark 'hem.

Colloquy

Mr. Monroe: Okay.

The Clerk: Your Honor, Government file in C112-103 will have to be deemed marked as Government Exhibit 10.

The Court: All right..

(Deemed marked Government Exhibit 10.)

The Court: And the other will be 11.

The Clerk: And the other will be 11.

The Court: And that is C124-58?

(200) The Clerk: Yes, sir.

The Court: Very well.

(Deemed marked Government Exhibit 11 for identification.)

Mr. Monroe: If your Honor pleases, at this time the Government requests the Court to take judicial notice of Government Exhibits 10 and 11 for identification, which are official records of the court.

The Court: Do you want me to take judicial notice of them, or are you offering them in evidence?

Mr. Monroe: I want to offer them in evidence and—

The Court: Show them to Mr. Lowenberg.

Mr. Monroe: Yes, sir.

Mr. Lowenberg: I will object to both, if your Honor pleases, on the ground that they are immaterial, irrelevant and incompetent, remote, and entirely prejudicial, and in addition no proof of anything as far as this defendant is concerned, and should not be offered as part of the Government case I submit.

The Court: I will receive them and you can have your exception.

Clifford Melikian—for Government—Recalled—Directed

Mr. Lowenberg: What is your Honor's ruling?
(201) The Court: You have an exception
both.

Mr. Lowenberg: Exception.

May I at this time move for the withdrawal
a juror—

The Court: Yes.

Mr. Lowenberg: —and the declaration of a
trial?

The Court: Denied.

Mr. Lowenberg: Exception.

(Government Exhibits 10 and 11 for identification received in evidence.)

The Court: All right, counsel.

Mr. Monroe: Your Honor, at this time the Government would recall Mr. Melikian.

CLIFFORD MELIKIAN, having been previously sworn,
called.

Direct Examination by Mr. Monroe:

Q. Mr. Melikian, you have testified as to certain transactions involving this defendant in November of 1951. You further testified that you arrested this defendant on November 16th and—

The Court: The jury has heard all this. (2)
The case can't be more than a day old.

Q. Following your arrest of the defendant, Mr. Melikian, what did you do? A. I took him down to the Bureau.

Clifford Melikian—for Government—Recalled—Direct

of Narcotics, the office of the Bureau of Narcotics, and I fingerprinted and photographed him there.

Q. What is the normal procedure with these fingerprints that you take from defendants at that time? A. There are four fingerprint cards with impressions taken from the defendant, and they are turned over to the clerk, and the clerk will proceed with various administrative procedures with them.

Q. Are any of these cards transmitted to the Federal Bureau of Investigation, the identification branch? A. Yes, they are.

Q. And do you thereafter receive information from the identification division of the FBI showing when other prints of that person have been filed with it? A. Yes, the office does.

Mr. Monroe: Exhibit 12 for identification.

(Marked Government Exhibit 12 for identification.)

Q. Mr. Melikian, I show you Government Exhibit 12 (203) for identification and I ask you if that is such a report as you received from the Federal Bureau of Investigation? A. Yes.

Q. And is that a record maintained by your office in the regular course of its business? A. Yes, it is.

(Mr. Monroe hands document to Mr. Lowenberg.)

Mr. Lowenberg: Same objection, if your Honor please.

The Court: The same as what?

Mr. Lowenberg: On the ground that it is immaterial, incompetent, irrelevant and entirely prejudicial to put in this evidence, and it's done by the

Clifford Melikian—for Government—Recalled—Direct

United States Attorney's office for no other purpose but to establish prejudice, and it is proof of nothing.

The Court: Well, the only thing—

Mr. Lowenberg: Certainly it can't establish any dealings in this traffic by showing that a man has record years and years ago.

The Court: I have already admitted in evidence the two commitments, and what disturbs me here is are you maintaining that this is a record kept by the Bureau of Narcotics?

(204) Mr. Monroe: When it is received from the Federal Bureau of Investigation, your Honor, yes.

Q. When this is received from the Federal Bureau of Investigation, and that is where it comes from, does it not— A. Yes.

Q. —they receive a copy from the prints that they take. A. Each agency, yes, sends it in.

Q. They send in prints and receive a report of this kind? A. Yes.

Mr. Lowenberg: I will press my objection.

The Court: Is this going to be the extent of your proof?

Mr. Monroe: It is, your Honor, if the Court receives it.

The Court: Well, this presents a problem that is squarely placed in my lap, madame and gentlemen, so we will take a short recess of five minutes.

(At this point the jury left the courtroom and the following proceedings took place in the absence of the jury:)

The Court: There are two things that disturb (205) me, Mr. Monroe.

Colloquy

This FBI record discloses a 1930 conviction with burglary tools, and it shows a charge in 1942 of a violation of 422, Public Health Laws, with no disposition.

It shows a policy conviction in March of 1945, and, as I gathered from your argument in chambers, you propose to prove that the man was convicted in '42 and '46 with drugs?

Mr. Monroe: That is correct, your Honor, and I want to offer that for the proof of the two convictions.

Mr. Lowenberg: Well, I know, but—

The Court: What do you intend to do then? How do you get rid of the balance that is on the record?

Mr. Monroe: Well, I think we can block that out, if your Honor pleases, by either covering it up with paper or—

The Court: And then I am not too clear whether it is a record kept in the regular course of business under the statute when they receive it from another agency. The FBI might very well testify that it was a record kept by them in the regular course of their business and that they submit it to the various agencies that sent prints to them, but you have indicated (206) to me that this is your proof to tie in these two exhibits, 10 and 11—

Mr. Monroe: That is correct—

The Court: —with this defendant?

Mr. Monroe: Yes, sir.

The Court: And that is the only way you are going to do it I understood you to say.

Mr. Monroe: If your Honor receives it, it is the only way I intend to do it.

The Court: Do you have any cases—I assume you don't—tending to show that under the statute that

Colloquy

a record received from the FBI by the Bureau of Narcotics is a record kept by the Bureau of Narcotics in the regular course of its business?

Mr. Monroe: I do not have any cases on that precise point.

The Court: Well, you agree with me that the burglary charge 25 years ago possibly is remote?

Mr. Monroe: I do not offer it for that, your Honor, and I would debate that.

The Court: And do you know what this 1942 charge is? Is that the same charge?

Mr. Monroe: 422 of the Public Health Laws. (207) I believe that is a narcotic violation.

The Court: Yes, but the first item appears to be 3-25-42, the date on the 422 Public Health Law, no disposition, and then the next is 4-8-42, Harrison Act.

Mr. Monroe: Yes, sir.

The Court: And the next appears to be 4-8-42, possession of smoking opium, and they all appear to be three separate charges.

Then when you get down to 6-10-42 there is a charge of unlawfully smoking opium, and the disposition is one year and six months.

Should the jury speculate, in your opinion, as to whether or not they are three different crimes which are charged here?

Mr. Monroe: Well, certainly, your Honor, there is one crime in that group.

The Court: Well, how will the jury know that?

Mr. Monroe: Well, I think I could probably ask Mr. Melikian if that is the case and let him testify.

The Court: I just do not think that is the right way to do it, but we are agreed that your purpose is merely to tie in Exhibits 10 and 11 with this defendant?

Colloquy

(208) Mr. Monroe: That is right, your Honor.

The Court: And as far as you have prepared your case this is how you intend to do it?

Mr. Monroe: That is right, your Honor.

The Court: I have great hesitancy in saying that it is correct even with the exclusion that you can physically exclude, that is to say, physically exclude all these other items from the exhibit.

Now, do you have the agent who made the arrest in '42 or '46?

Mr. Monroe: No, I do not, your Honor.

The Court: Have you still got the cards?

Mr. Monroe: I can prove the 1946 arrest but I would have to get Mr. Drago from the AT&T over here.

The Court: From where?

Mr. Monroe: From the AT&T.

The Court: The AT&T?

Mr. Monroe: That is right, your Honor, or, your Honor, the special tax unit, that is the A & T T.

I would first have Mr. Melikian testify to the print cards he made in 1951 and comparing them with the print cards of the defendant in the 1946 case, and then have Mr. Drago examine the two print cards, and testify that they are the prints of the same person.

(209) Mr. Lowenberg: I would object to that way of proceeding, too, Judge.

The Court: You can exercise whatever objections you want.

Mr. Lowenberg: I understand that, Judge, but I got to protect the record.

The Court: Well, unless you can give me some authority for receiving these with the parts taken out that you will concede are objectionable, I hesi-

Colloquy

tate seriously as to whether or not it comes within the statutory shop book rule.

Mr. Monroe: Well, if your Honor pleases, may we have an adjournment until tomorrow morning so that we can prepare a memorandum on that?

The Court: I know, but preparing a memorandum, and then if I disagree we then have another adjournment to do it in some other way.

Mr. Monroe: Not at all, your Honor. If this is not the proper way to do it I will certainly be able to tell you by tomorrow morning.

The Court: Didn't you in the preparation of this case consider the problem at all? You must have spent considerable time on it as to how you would prove identity of the fingerprint records.

(210) Mr. Monroe: I will have to say frankly that I anticipated a stipulation as to the identity, if your Honor pleases.

The Court: You anticipated a stipulation in a criminal case?

Mr. Monroe: Mr. Lowenberg stipulated on the last trial to a number of things.

Mr. Lowenberg: Not as to that. That was never offered.

Mr. Monroe: But certainly as to the narcotics themselves.

The Court: Well, I would take it that the arrest in 1942 was by New York City detectives, wasn't it?

Mr. Monroe: No, I believe that was by narcotic agents.

The Court: And they arraigned him under the Public Health Laws?

Mr. Monroe: Well, Section 422 of the Public Health Laws is not disposed of, and following that there is the Federal violation of the Harrison Act.

Colloquy

The Court: You claim that there were two arrests then?

Mr. Monroe: Yes, your Honor.

The Court: Well, then, I was correct that the (211) New York City Police arrested him on 3-25-42.

Mr. Monroe: That is right, but there are two different violations. I don't know what disposition was made of the first.

The Court: That clearly would be prejudicial, wouldn't it?

Mr. Monroe: That is right, your Honor. I mean to exclude the 422 of the Public Health Laws.

The Court: Well, I know that there are some civil cases in which they have permitted in the construction of the shop book rule matters received from others which they keep as part of their own records. However, I am not so sure that the same rule applies in the criminal case, and *Caute vs. New York, New Haven & Hartford Railroad* is one of the cases I have in mind.

Do you know who the arresting officers were in 1946?

Mr. Monroe: In 1946 I do know.

The Court: Are they available here?

Mr. Monroe: They are not. Mr. Siracusa was the principal arresting officer and he is now District Superintendent of a European district.

The Court: Aren't these people when they are (212) arrested by the Narcotic Bureau in addition to being fingerprinted by that bureau fingerprinted by the U. S. Marshal when they are brought here for arraignment?

Mr. Monroe: Yes, sir.

The Court: Well, your application now is for an adjournment until tomorrow?

Colloquy

Mr. Monroe: Yes, your Honor.

The Court: Do you oppose that?

Mr. Lowenberg: Yes, Judge, I am ready to go on now and to continue until the end of the day.

Personally I believe that all of this is immaterial and certainly prejudicial. You have a conviction there in 1947 which is—

The Court: I have ruled.

Mr. Lowenberg: —four years before the date—

The Court: I have ruled on it.

Mr. Lowenberg: I understand, but I want to point something out to your Honor, which is, four years before the date contained in this indictment.

Now, a man could be convicted in 1947 and not be engaged in—

The Court: You made that point, Mr. Lowenberg.

Mr. Lowenberg: I want to point this out to you, Judge, that in the Sorells case upon which Mr. (213) Monroe relies, that was a bootlegging case in effect, but they had evidence that the man was engaged—

The Court: Well, are we not agreed that this was discussed with me in chambers yesterday, or in the robing room, at which time you made your point rather extensively?

Mr. Lowenberg: That is true.

The Court: And you gave me in addition Judge Hand's opinion in this particular case.

Mr. Lowenberg: That is correct.

The Court: Well, I have now received in evidence the record of conviction of a man named Sherman for 1942 and 1946, and you made your objection to it, and I made my ruling, and you have your exception.

The question now is do you oppose an application for adjournment by the Government?

Colloquy

Mr. Lowenberg: ~~Yes~~ do.

The Court: On what ground?

Mr. Lowenberg: Upon the ground that I am prepared to proceed at this time. This case has been pending since 1951 and this is 1956, Judge.

The Court: May we have the record show that you asked for an adjournment yesterday so that you could further prepare your case?

(214) Mr. Lowenberg: All right. I will withdraw my application, Judge.

The Court: Very well.

Mr. Lowenberg: May I say this to your Honor on the record—

The Court: Yes.

Mr. Lowenberg: —that as far as the receipt of these commitments are concerned, may I reserve my objection to them as to the receipt in evidence until such time as the U. S. Attorney presents his proof of identification?

The Court: I think you had previously objected.

Mr. Lowenberg: Yes, but your Honor has overruled the objection.

The Court: Yes.

Mr. Lowenberg: And you say you are receiving them.

The Court: Yes.

Mr. Lowenberg: I say to your Honor that no basis has been laid, no proper foundation has been laid for their receipt in evidence.

The Court: If he does not connect them up properly I will strike them out.

(215) Mr. Lowenberg: All right.

The Court: Will you ask the jurors to just sort of gather by the door there and I will excuse them until tomorrow morning?

Clifford Melikian—for Government—Recalled—Direct

(At this point the discussion in the absence of the jurors terminated and the following proceedings took place in the presence of the jury:)

The Court: I think you can all hear me now.

I am going to excuse the jury until tomorrow morning at 10:30. The Government has asked for a recess until that time, so you are excused and with the same injunction as yesterday, to please refrain from discussing the case until it is finally submitted to you, and with God's grace that will be tomorrow morning some time.

(Adjourned to June 6, 1956, at 10:30 A.M.)

(216)

UNITED STATES OF AMERICA

VS.

JOSEPH GEORGE SHERMAN

New York, June 6, 1956,
10:30 A.M.

(Trial resumed.)

CLIFFORD MELIKIAN, called as a witness on behalf of the Government, having been previously sworn, resumed the stand.

Direct Examination by Mr. Monroe (Continued):

Q. Mr. Melikian, is it the custom of the Bureau of Narcotics to place an index in each case which it develops, an index number? A. Yes, sir, a case number.

Clifford Melikian—for Government—Recalled—Direct

Mr. Lowenberg: Your Honor please, may the record show that all of this is being taken under the constant objection of the defendant so that I need not get on my feet and constantly object to this line of evidence? In order to facilitate matters it is objected to, of course, by the defendant, and to which we note our exception to your Honor's ruling.

(217) The Court: The record will note your objection to Government Exhibit 10 in evidence.

Q. Mr. Melikian, I show you Government Exhibit 10 in evidence, and I also show you Government Exhibit 10-A for identification, and I ask you what Government Exhibit 10-A for identification is? A. 10-A for identification is the green form, 121, kept by the Bureau of Narcotics in District No. 2, giving the final disposition as to the defendant in these cases.

Mr. Lowenberg: I move to strike out the expression "as to the defendant," Judge.

The Witness: As to the defendant mentioned herein. That is what I mean, or hereon.

Q. Does Government Exhibit 10-A for identification relate to the case referred to in Government Exhibit 10 in evidence? A. Yes.

Q. Does Government Exhibit 10-A for identification have a file number on it, a case number on it? A. Yes, it has.

Q. And what is the case number on that? A. It is New York Southern 5067.

Q. Is it the customary practice of the Bureau of (218) Narcotics and with narcotic agents to place a case number on all documents relating to that case? A. Yes, it is.

Q. You testified yesterday, Mr. Melikian, that you pre-

Clifford Melikian—for Government—Recalled—Direct

pare routinely fingerprint charts of all defendants arrested in cases developed by your bureau. A. Yes.

Q. Does that case number go on those fingerprint charts?

A. Yes, it does.

Q. How many fingerprint charts do you regularly prepare in each case and in the case of each defendant?

The Court: He testified yesterday, as I recall it, that when they arrested the defendant and brought him to his office he took four sets of prints; is that correct?

The Witness: That is correct, your Honor.

Q. Is that the usual number taken in the Bureau of Narcotics? A. Yes.

Q. What is the disposition of each of those sets of prints? A. Well, one is sent to the Federal Bureau of Investigation; one is sent to the Bureau of Narcotics in (219) Washington, D. C.; one is sent to the identification section of the Alcohol and Tobacco Tax unit of the Treasury Department, and the fourth copy is usually kept in the files of the office where the set of fingerprints were taken.

Q. And is Government Exhibit 10-A a record regularly maintained by the Bureau of Narcotics in the regular course of business? A. Yes, it is.

(Mr. Monroe hands document to Mr. Lowenberg.)

Mr. Lowenberg: May I see 10, please?

Mr. Monroe: (Handing to Mr. Lowenberg.)

Mr. Lowenberg: May I ask a few questions on the voir dire, Judge?

The Court: Yes.

*Clifford Melikian—for Government—Recalled—
Preliminary Cross*

Preliminary Cross Examination by Mr. Lowenberg:

Q. Mr. Melikian, you say that 10-A has a number, is that correct? A. Yes.

Q. And will you please point to that number first? A. 5067, that is correct.

Q. Now, on 10, will you show me the number on 10? A. That does not appear.

Q. It does not appear? (220) A. No.

Q. Now, you were able to identify on direct examination 10 and 10-A by the number that appears on 10-A, is that correct? A. No, sir.

Q. No? A. No.

Q. What other way can you identify it? A. By the date.

Q. By the date? A. And the name.

Q. And the name? A. That's right, sir.

Q. Anything else? A. And the disposition.

Q. And the disposition? A. That is all.

Q. So that the only way that you can connect 10-A with 10 is by the name and date and the disposition? A. That is right, sir.

Q. Is that right? A. Yes, sir.

Q. Nothing else? A. Nothing else.

(221) Q. So that when you testified on direct examination that you could connect 10-A and 10 by a number, that was not wholly true, was it? A. I did not testify under direct examination that I connected it with the number, sir.

Q. And when did you see these papers before? A. When did I see these papers before?

Q. Before this morning, yes. A. Exhibit 10 I saw this morning for the first time, and Exhibit 10-A I had seen before, but exactly when I don't know.

Q. You don't recall? A. No, sir.

Clifford Melikian—for Government--Recalled--Direct

Mr. Lowenberg: I will object to the introduction of 10-A, if your Honor please, on the ground that there has been no proper basis laid.

The Court: Are you going to have further proof, Mr. Monroe?

Mr. Monroe: Yes, your Honor.

The Court: Is this your only proof as to identification?

Mr. Monroe: I am also going to introduce the fingerprint chart.

The Court: Well, we will leave it marked as (222) Exhibit 10-A for identification temporarily.

Mr. Monroe: Government Exhibit 11-A for identification.

(Marked Government Exhibit 11-A for identification.)

By Mr. Monroe:

Q. Mr. Melikian, I am handing you Government Exhibit 11 in evidence and 11-A for identification, and I ask you to examine 11-A for identification and tell me if you find an index number on that? A. Yes, I do.

Q. What is the index number on that? A. New York Southern 6228.

Q. Does Government Exhibit 11-A relate to Government Exhibit 11 in evidence?

Mr. Lowenberg: Objected to as a conclusion, if your Honor pleases.

The Court: Yes, I submit that is a sound objection. You have not asked enough questions.

Q. Will you examine Government Exhibit 11 and 11-A.

Clifford Melikian—for Government—Recalled—Direct

together and state whether or not Government Exhibit 11-A relates to the same case as Government Exhibit 11?

Mr. Lowenberg: I will object to that, if (223) your Honor please.

The Court: Well, I will allow it. He said he is familiar—or are you familiar with the records of your office?

The Witness: Yes, sir.

The Court: Are you familiar with that form?

The Witness: Yes, sir.

The Court: And that is Form 121?

The Witness: 121, sir.

The Court: And that is a record kept by your office showing the disposition of the cases that were handled in your office?

The Witness: That is correct, they were.

The Court: And it gives the name of the defendant, the date of conviction and disposition by the Judge?

The Witness: And the docket number of the case.

The Court: And the docket number of the case?

The Witness: Yes.

The Court: The docket number of the Federal Court?

The Witness: Yes, sir.

The Court: The question is can you compare (224) those two and state whether or not they relate to the same matter?

The Witness: I can.

The Court: Your answer is?

The Witness: Yes.

*Clifford Melikian—for Government—Recalled—
Preliminary Cross*

By Mr. Monroe:

Q. But you say that Government Exhibit 11-A for identification is a record maintained by your bureau in the regular course of business? A. Yes, it is.

* The Court: I take it you make the same objection?

Mr. Lowenberg: I would like to ask a few questions on the voir dire.

The Court: Could we shorten it? Would your answers be the same to Mr. Lowenberg with regard to that identification?

The Witness: Yes, sir.

The Court: And just the name, the date, and the disposition, that makes you identify it?

The Witness: Yes, on that particular one, your Honor.

I also notice the docket number, two docket numbers.

(225) *By Mr. Lowenberg:*

Q. Well, let me ask you this: On 11 there is a middle initial in that name, is there not? A. There is a middle initial, that is right, sir.

Q. And on 11-A there is no middle initial, is that right? A. That is correct, sir.

Q. Are you prepared to swear in the face of that that relates to the same person? A. I am only testifying from what other information there is on that.

Q. Are you prepared to swear that that relates to the same person? A. Yes.

Q. You hesitated a minute or two, didn't you? A. I think I have no hesitancy—

*Clifford Melikian—for Government—Recalled—
Preliminary Cross*

Q. You hesitated? A. Yes, sir.

Q. Now, do you base that on your own information, or upon what somebody else told you? A. I base it on what I see there.

Q. Well, show me the number on this first. A. Right here, Mr. Lowenberg (indicating).

Q. Show me the number on 11-A. (226) A. (Witness indicates).

Q. Show me the date of arraignment on 11 as compared with the date on 11-A: A. Arraignment?

Q. Yes. A. I do not see any arraignment date on this.

Q. So that is different, is that correct, is that right?

The Court: May I suggest that when you look at 11 that you look at the back of 11-A in answer to the question as to what the date of arraignment is.

The Witness: I just looked at the front sheet.

Q. Will you look at the back at the Court's suggestion?

Mr. Monroe: There are several sheets.

The Court: The back of the last paper on that exhibit.

Mr. Lowenberg: May it appear that the witness had first stated that both—

The Court: You do not have to clarify or repeat what the witness said. We have a reporter here who is recording what was said.

Mr. Lowenberg: I would like to have the record show that—

(227) The Court: No.

Mr. Lowenberg: Just for the purposes of the record.

The Court: Please proceed. If it is anything that the witness has said the reporter has noted it.

*Clifford Melikian—for Government—Recalled—
Preliminary Cross*

Mr. Lowenberg: All right. Your Honor is restraining me from indicating what has happened with respect to it for the purposes of the record and I except.

The Witness: I do not see an arraignment, your Honor.

The Court: May I have it?

The Witness: Yes (handing to Court).

By Mr. Lowenberg:

Q. You looked at the first page only, did you not? Yes.

Q. When you said it referred to the same case, is that correct? A. That is correct.

Q. You did not look through all the sheets, did you?

The Court: Will you look at part of that record where—

Mr. Lowenberg: May I get an answer to my questions?

(228) The Court: Yes. What is your question?

Q. You looked only on the first sheet when you said that referred to the same case, did you not? A. Yes.

Q. You did not search through all the papers that were represented here, is that correct? A. No, sir.

The Court: Let me interrupt.

Q. And you rendered an opinion—

The Court: Let me interrupt.

Did you look at that particular paper on this page of that Exhibit 11?

*Clifford Melikian—for Government—Recalled—
Preliminary Cross*

The Witness: Did I look at that, sir?

The Court: Yes.

The Witness: No, I did not.

The Court: Will you look at it now and see if you can answer counsel's question?

The Witness: All right.

The Court: Do you remember the question?

The Witness: It was as to the date of the arraignment.

Mr. Lowenberg: Correct.

The Court: All right, never mind. Go on to something else.

(229) Mr. Lowenberg: I would like to have an answer to that question if your Honor will please permit it.

The Court: Evidently we can't get it.

Mr. Monroe: The question of arraignment is technically a matter, your Honor, where—

Mr. Lowenberg: Just a minute. I submit no argument is required. I would like to see if we can get an answer to your Honor's question.

The Court: Are you able to answer the question?

The Witness: I do not see it.

The Court: All right. Let us get on to another one.

By Mr. Lowenberg:

Q. Now, when his Honor asked you that question to look at all the papers, and there are one, two, three, four, five, six, seven, eight, nine, ten, you had looked only at the first one? A. That is correct.

Q. When you stated that it referred to the same case, did you not? A. That is correct.

Clifford Melikian—for Government—Recalled—Direct

Q. You did not search through the ten papers, did you?
(230) A. No.

Q. And you did not see the date of arraignment on No. 11?
A. I did not, sir.

Mr. Lowenberg: I will object to it, if your Honor pleases.

The Court: All right, still have it marked as an exhibit for identification only.

By Mr. Monroe:

Q. Mr. Melikian, I ask you to examine Government Exhibit 11-A for identification and state what you see in the second—

Mr. Lowenberg: Objected to.

The Court: Objection sustained.

All right, let us get on.

Mr. Monroe: Government Exhibit 10-B for identification.

(Marked Government Exhibit 10-B for identification.)

Mr. Monroe: Government Exhibit 11-B for identification.

The Court: Just a moment. You do not have to speak so loud to your client, Mr. Lowenberg, because of the possibility that the jury might hear you, and (231) since you are not testifying as a witness it would be prejudicial both to your client and to the Government.

Clifford Melikian—for Government—Recalled—Direct

(Marked Government Exhibit 11-B for identification.)

Mr. Monroe: And Government Exhibit 13.

(Marked Government Exhibit 13 for identification.)

Q. Mr. Melikian, I hand you Government Exhibit 10-B for identification, and I ask you to state what that is. A. This is a fingerprint card on which there are impressions of fingerprints.

Q. Does it contain on it—does it show from what office that fingerprint chart emanated? A. Yes, it does.

Q. What office does it show?

Mr. Lowenberg: Objected to.

The Court: Sustained.

Q. Does it also show the index number for that office?

Mr. Lowenberg: Objected to.

The Court: No, you may answer. It calls for an answer yes or no. A. Oh, yes, yes, it does.

Q. Will you state what that number is, please?

(232) Mr. Lowenberg: Objected to.

The Court: Sustained.

Q. Mr. Melikian, I show you Government Exhibit 11—

The Court: Show the two together if you are going to ask the same questions with regard to both exhibits.

*Clifford Melikian—for Government—Recalled—
Preliminary Cross*

Mr. Monroe: Not entirely, your Honor.

The Court: All right.

Q. I show you Government Exhibit 11-B for identification and I ask you what that is? A. It is also a fingerprint card of the fingerprint impressions, with fingerprint impressions on it.

Q. Will you state from what office that comes? A. The Bureau of Narcotics.

Q. Does it have an index number on it? A. It does.

Q. Will you state whether Government Exhibit 11-B is the Bureau of Narcotics copy of the fingerprints of the person mentioned in that exhibit?

Mr. Lowenberg: Objected to.

The Court: No, I will allow that.

A. Would you mind repeating your question?

Q. Is that a record of your office?

The Court: Is that a record from your office (233) relating to the person whose fingerprints are reported thereon?

The Witness: Yes, it is.

Mr. Monroe: If your Honor please, the Government offers 11-B in evidence at this time handing to Mr. Lowenberg).

Mr. Lowenberg: May I ask a couple of questions on the voir dire, Judge?

The Court: Yes.

Preliminary Cross Examination by Mr. Lowenberg:

Q. Did you personally take these prints? A. No, sir.

Q. Did you personally have any supervision over its filing? A. No, sir.

Clifford Melikian--for Government--Recalled--Direct

Q. Were the prints brought to you? A. No, sir.

Q. When did you see these prints for the first time?

A. Yesterday.

Q. Yesterday? A. Yes.

Q. And you did not take those prints? A. No, sir.

(234) Q. And you had nothing to do with this case? A. No, sir.

Mr. Lowenberg: Objected to, if your Honor pleases.

The Court: Well, you said that Exhibit 11-B, which was the second of the two prints that were shown to you, was from the records of the Bureau of Narcotics.

Did you mean by that from your office, or from some other place?

The Witness: From Washington Street.

The Court: And you made no such identifying remarks with regard to the first one?

The Witness: No, sir.

The Court: I sustain the objection.

Mr. Lowenberg: What is your Honor's ruling?

The Court: I sustain the objection. I assume you make an objection to both?

Mr. Lowenberg: Yes, to both.

By Mr. Monroe:

Q. With respect to Government Exhibit 11-B for identification, Mr. Melikian, did you find that in the files of your office or did you get that from the files of the Bureau in Washington?

Mr. Lowenberg: Objected to as already asked (235) and answered, Judge.

Clifford Melikian—for Government—Recalled—Direct

The Court: Maybe we can clear it up. I don't know.

Mr. Lowenberg: Exception.

A. It appears that this is from the Bureau—

The Court: No.

Mr. Lowenberg: I object to that.

The Court: Yes, objection sustained.

The question is did you get it, as I understood it, from your office?

Was that it, Mr. Monroe?

Mr. Monroe: Yes, sir.

The Witness: I did not get this from my office, no.

Q. Did you get it from the case file in the case for which the file number—for which that card bears the file number?

Mr. Lowenberg: Objected to as being rather complicated. However, he has already testified that he did not get it from his office.

The Court: I will allow it.

Mr. Lowenberg: Exception.

A. I am not sure, Mr. Monroe. There is one thing that throws me off.

(236) Q. What is that?

Mr. Lowenberg: I did not hear that.

The Court: "There is one thing that throws me off," and then the prosecutor asked "What is that?"

Q. Where is the case file in the case for which this card bears a file number?

Clifford Melikian—for Government—Recalled—Direct

Mr. Lowenberg: Objected to.

The Court: I will allow it.

Mr. Lowenberg: Exception.

A. It is in the New York office of the Bureau of Narcotics.

Q. Did you examine that case file? A. Yes, I did.

Q. And did you find that card in the case file?

Mr. Lowenberg: Objected to as already having been asked and answered in two different ways.

The Court: I will allow it.

Mr. Lowenberg: Exception.

A. Yes, I did.

Q. Is it the regular course of business for your office to maintain and keep in the case file all print charts taken of the defendants on cases which it develops?

Mr. Lowenberg: Objected to.

The Court: I will allow it.

(237) A. Yes, sir.

Mr. Monroe: If your Honor pleases, the Government again offers Government Exhibit 11-B in evidence.

Mr. Lowenberg: May I ask a few questions?

The Court: You still object, do you?

Mr. Lowenberg: Judge, I still object.

The Court: Sustained.

Mr. Lowenberg: If it is sustained—

The Court: Yes.

Mr. Lowenberg: —then I will refrain from asking questions.

Clifford Melikian—for Government—Recalled—Direct

Q. Mr. Melikian, I show you a folder of documents and I will ask you if you will state what that is? A. This is a case file that is kept by the Bureau of Narcotics.

Q. I ask you if that is the case file from which Government Exhibit 11-A for identification was taken? A. Yes, it is.

Q. Will you examine that case file and state whether or not you find therein a fingerprint chart for the defendant named in Government Exhibit 11-A for identification? A. I do not.

(238) Q. Is that the file in which you found Government Exhibit 11-B for identification?

Mr. Lowenberg: Objected to, if your Honor pleases, as leading and suggestive to the witness.

The Court: It certainly is, but I will allow it.

A. Yes.

Q. And you took Government Exhibit 11-B for identification from this case file that—

Mr. Lowenberg: Objected to as leading the witness. We have now Mr. Monroe himself doing the testifying.

The Court: I will allow it.

Mr. Lowenberg: Exception.

A. Yes.

Mr. Monroe: The Government again offers 11-B for identification in evidence.

Mr. Lowenberg: Objection.

The Court: Objection sustained.

Mr. Lowenberg: Sustained?

Clifford Melikian—for Government—Recalled—Direct

The Court: Yes.

Mr. Lowenberg: Thank you.

Let me ask you, Mr. Monroe, do you have any other witnesses than this gentleman?

Mr. Monroe: Yes, your Honor.

(239) The Court: All right.

Q. Mr. Melikian, will you examine Government Exhibits 11-A and 11-B for identification and state whether or not they relate to the same defendant in the same case?

Mr. Lowenberg: I will object to that, Judge.

The Court: Well, I think the man would have to be more qualified, wouldn't he?

Q. Do they bear the same—

The Court: Are you asking him to compare the fingerprint card and say whether that print or the impressions there relate to the same man identified in 11-A?

Mr. Monroe: 11-A.

Mr. Lowenberg: 11-A.

Mr. Monroe: 11-A is the form 121, if your Honor pleases, and 11-B is the fingerprint chart.

The Court: Yes, but you are asking him to state whether or not those impressions of somebody's fingerprints relate to the same man who is mentioned in the form.

Mr. Monroe: That is right.

Mr. Lowenberg: I press my objection, Judge.

The Court: And you are going to do it by name and number?

Clifford Melikian—for Government—Recalled—Direct

(240) Mr. Monroe: By name and number and other identification.

The Court: Why not ask him whether the name is the same, whether the docket number is the same, and so forth?

Mr. Monroe: All right.

Q. Is the index number, the file number on 11-B the same as the file number on 11-A? A. It is.

Q. Is the name of the person on 11-C the same as the name of the person on 11-A?

Mr. Lowenberg: May the record show that all of this is being offered under my constant objection.

The Court: It seems to me, I recall, that we have gone through this rather thoroughly. Am I wrong in that?

Mr. Lowenberg: I believe we have, your Honor.

Mr. Monroe: Pardon?

The Court: I seem to recall that within the last half hour we seemed to have had these questions and answers.

I have a note which indicates that he testified that he compared 11-A with 11, and said based upon the docket number, the name, the disposition, that it related (241) to the same person. And on cross-examination he admitted that there was no middle initial in the name, and that there was a date of arraignment which he could not find in the other exhibit. Haven't we been through that?

Mr. Monroe: Not with respect to 11-B, your Honor.

The Court: Really? Perhaps I am in error. 11-B is the card?

Clifford Melikian—for Government—Recalled—Direct

Mr. Monroe: The card.

The Court: All right. I am in error. Go ahead and ask the question of him.

Q. Do Exhibits 11-A and 11-B bear the same name?

Mr. Lowenberg: Objected to.

The Court: No, I will allow it.

Mr. Lowenberg: May the record note my exception?

The Court: I thought we agreed that you would not have to press all these objections.

Mr. Lowenberg: That is all I wanted.

Q. Do they also bear the same index number? A. Yes, the same case number.

Q. Does 11-B show that it emanated from the Bureau of Narcotics? (242) A. Yes, it does.

Mr. Monroe: If your Honor pleases, I again offer 11-B.

Mr. Lowenberg: Objected to, if your Honor pleases.

The Court: I will leave it marked as 11-B for identification.

Q. Mr. Melikian, I show you Government Exhibit 13 for identification, and I ask you what that is, please? A. This is also a fingerprint card with fingerprint impressions on it.

Q. Did you take these fingerprints yourself? A. I did.

Q. Are these the defendant's prints?

Mr. Lowenberg: Objected to.

The Court: I will allow it.

Mr. Lowenberg: Exception.

*Clifford Melikian—for Government—Recalled—
Preliminary Cross*

A. Yes, it is.

Q. And you took them at the time that you arrested the defendant, is that correct? A. That is correct.

The Court: When was that?

The Witness: November 16, 1951, your Honor.

Mr. Monroe: If your Honor please the (243) government offers 13 for identification in evidence.

The Court: Any objection, counsel?

Mr. Lowenberg: I object to it, Judge.

The Court: On what ground?

Mr. Lowenberg: On the ground that no proper foundation has been laid.

The Court: He said—

Mr. Lowenberg: There is no qualification.

The Court: He took the prints himself.

Mr. Lowenberg: No qualification as to this man being an expert on fingerprints.

May I ask him a few questions, Judge, on the voir dire?

The Court: Yes.

Preliminary Cross Examination by Mr. Lowenberg:

Q. Are you a fingerprint expert? A. No, sir.

Q. No? A. No.

Q. Now, you say that these prints were taken when? A. November 16, 1951.

Q. 1951? A. Yes, sir.

Q. Is that right? (244) A. Yes, sir.

Q. And they were taken by you? A. That is correct.

Q. Is that correct? A. That is right.

Q. And did you fill out the back of that card? A. I did.

Q. When did you see the prints after this or since 1951?

A. Yesterday.

*Clifford Melikion—for Government—Recalled—
Preliminary Cross*

Q. So you had not seen them from 1951 to this time? A. That is correct.

Q. Is that right? A. Yes.

Q. And just by looking at the prints you could not tell me whose prints they are? A. By looking at the prints, no, sir.

Mr. Lowenberg: I object to it, if your Honor please.

The Court: What is there about the card that makes you testify that you took them and that they are the prints of the defendant?

The Witness: My signature, your Honor, and also I remember that the defendant affixed his signature (245) to the card.

The Court: You saw him sign it?

The Witness: Yes, sir, in my presence.

The Court: Now, how do you take fingerprints? Do you have to have some special skill?

The Witness: No.

The Court: Tell the jury how you do it.

The Witness: We have black ink—first of all we have a smooth surface. It is a chrome plated surface about—well, almost to the average man it comes to where his arms would be.

You take some ink, a special type of ink for fingerprinting, taking an impression. You take that ink and then you apply it to the roller and you roll it smoothly across this smooth metal surface. Once that is done then you take and roll a person's thumb.

The theory is that you are supposed to roll the thumb inward, because it is a natural roll, and the fingers outward, and you do that with the thumb first and all the fingers, and then take it and transfer your impression onto the fingerprint card.

Anthony J. Drago—for Government—Direct

The Court: How many have you taken prior to November 16, 1951?

The Witness: Oh, I couldn't truthfully say, (246) your Honor.

The Court: Would it be more than one?

The Witness: Oh, yes, sir.

The Court: And you identify the card because you recognize your signature?

The Witness: Yes, sir.

The Court: And the signature of the defendant who signed it?

The Witness: Well, I remember the defendant at the time of signing it, your Honor.

The Court: I will receive it.

(Government Exhibit 13 for identification received in evidence.)

Mr. Monroe: You may examine.

Mr. Lowenberg: No questions.

The Court: All right, thank you.

(Witness excused.)

Mr. Monroe: Anthony Drago.

ANTHONY J. DRAGO, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Monroe:

Q Mr. Drago, what is your occupation? (247) A. I am a special investigator and chief of the identification unit of the Alcohol and Tobacco Tax Division of the Internal Revenue service, United States Treasury Department.

Anthony J. Drago—for Government—Direct

Q. Will you describe your duties in the course of your duties as a special investigator and as chief of the identification unit of the Alcohol and Tobacco Tax Division?

Mr. Lowenberg: I will concede the fact that he is an expert, Judge.

The Court: I did not hear you.

Mr. Lowenberg: I have no objection. I think he is an expert on fingerprinting.

Mr. Monroe: Fingerprint identification.

Mr. Lowenberg: Yes, sir.

The Court: Thank you.

Q. Mr. Drago, I show you Government Exhibit 10-B for identification, and I ask you if you will state what that is? A. Pardon?

Q. Will you state what that is?

Mr. Lowenberg: I will object to all questions pertaining to that exhibit upon the ground that it has only been marked for identification; it is not in evidence.

(248) The Court: I will allow it.

Mr. Lowenberg: Exception.

A. This is a fingerprint card.

Q. Will you state where you first saw that? A. In my office, in my file.

Q. Was that card taken from your file? A. Yes, sir.

Q. Is it the regular course of business at your office to maintain such fingerprint cards? A. It is.

Q. And where did you get that card from? A. This card was received in our office from the Narcotic Bureau.

Q. And you maintained it in your records, is that correct? A. That is right.

Anthony J. Drago—for Government—Cross

Q. I show you Government Exhibit 11-B for identification and Government Exhibit 13 in evidence, and ask you if you will state what those are? A. Those are also fingerprint cards.

Q. Have you compared the prints shown on those cards?

Mr. Lowenberg: Objected to.

The Court: I will allow it.

(249) Mr. Lowenberg: Exception.

A. I have.

Q. Are they the prints of the same person? A. The two cards were made by the same person.

Q. The whole three cards? A. Well, the third card, which is the card which I have in my file, is also made by the same person.

Q. That is, all three of those cards show the fingerprints of the same individual, is that correct? A. That is correct.

Mr. Monroe: Thank you. You may examine.

Cross Examination by Mr. Lowenberg:

Q. You say you got one card from your office? A. Yes, sir.

Q. Will you tell me which one? A. Yes, sir, right here (indicating).

Q. Did you bring it to court yourself? A. I brought it to Mr. Monroe.

Q. When? A. This morning.

Q. This morning? A. Yes.

Q. Now, do you know—

The Court: Which one did you identify, 10-B?

(250) Mr. Lowenberg: 10-B.

Anthony J. Drago—for Government—Cross

The Witness: 10-B for identification.

Mr. Lowenberg: Let me see the other two cards, will you, please?

Mr. Monroe: There they are (indicating).

Q. And 13 or rather 11-B for identification, you did not bring that, did you? A. No, sir. That was brought to my office yesterday.

Q. By whom? A. By agent Melikian.

Q. Do you know where he got it from? A. No.

Q. And 13? A. That was also brought to me yesterday by agent Melikian.

Q. And do you know where he got it from? A. No, I don't.

Q. So the only one that you brought to the United States Attorney was 10-B for identification? A. Well, all these (indicating).

Q. Yes. A. And I brought him also I believe another one.

Mr. Monroe: I have it here.

(251) Q. But all these three? A. Yes.

Q. Those are the only ones? A. That is correct.

Q. That he brought, is that correct? A. That is correct.

Mr. Lowenberg: Now, I will object, if your Honor pleases, to 11-B and 13.

I think your Honor has ruled on 13.

The Court: I will receive them all.

Mr. Lowenberg: Exception.

Mr. Monroe: Are they all now received in evidence?

The Court: That is what "all" means I take it.

Mr. Monroe: Does that include 10-A and 11-A?

Clifford Melikian—for Defendant—Recalled—Direct

The Court: Well, Webster's Dictionary says that "all" is a rather inclusive word.

Mr. Monroe: I have no further questions.

Mr. Lowenberg: I have no questions.

The Court: Government rests?

Mr. Monroe: Government rests.

Mr. Lowenberg: Judge, I would like to recall Mr. Kalchinian.

The Witness: May I remain in the courtroom, (252) your Honor?

The Court: Yes.

Mr. Lowenberg: And I wanted to call Mr. Melikian for one or two questions in the face of this evidence.

The Court: Before the other evidence?

Mr. Lowenberg: Yes, before.

The Court: Would you mind holding up calling Mr. Kalchinian then?

CLIFFORD MELIKIAN, recalled by the defendant, testified further as follows:

Direct Examination by Mr. Lowenberg:

Q. Mr. Melikian, how long have you been a narcotic agent? A. Approximately six years.

Q. When a man is committed to Lexington, Kentucky, is that for a cure? A. Yes, sir.

Q. A man has to be an addict to be committed there, is that correct? A. That is correct, sir.

Q. And it is an institution maintained by the United States Government? (253) A. That is correct.

Q. For the curing of addicts, is that right, sir? A. That's correct.

Charles Kalchinian—for Defendant—Recalled—Direct

Q. And, as a matter of fact, an individual can sign himself in there without a court committing him? A. I don't know what the procedures are now, sir.

Q. But a man can only be committed, or a woman, to Lexington, Kentucky, to that institution, only if the individual is an addict? A. That is correct.

Mr. Lowenberg: That is all.

Mr. Monroe: I have no questions.

(Witness excused.)

Mr. Lowenberg: May we have Mr. Kalchinian recalled now?

CHARLES KALCHINIAN, having been previously sworn, recalled by the defendant, testified further as follows:

Direct Examination by Mr. Lowenberg:

Q. Mr. Kalchinian, are you a naturalized citizen?

The Court: What difference does that make?

Mr. Lowenberg: I want to show, Judge, that there were deportation proceedings pending.

(254) The Court: The man is still here. I do not see how it has any relevancy at all.

Mr. Lowenberg: May I put the question?

The Court: In the absence of the jury you may, yes.

Mr. Lowenberg: All right. I would like to submit it to your Honor.

The Court: The purpose is to show what?

Colloquy

Mr. Lowenberg: To show that the Government has instituted deportation proceedings.

The Court: The jury has heard it now. And that they did not succeed?

Mr. Lowenberg: That they withdrew it. They did not proceed.

The Court: That is even better, and it was a success for the defendant, wasn't it?

Mr. Lowenberg: Pardon me?

The Court: Will you concede that they did that? The jury heard it. I think it is very prejudicial to this witness and everybody else.

Mr. Monroe: Frankly, your Honor, I do not have any real independent knowledge of it.

Mr. Lowenberg: That is the reason for my question and I would like to inquire.

(255) The Court: Ask the witness that.

Did you ever have deportation proceedings started against you and then withdrawn?

The Witness: Yes, I believe so, your Honor.

Mr. Monroe: Were they actually withdrawn?

The Witness: I don't know that.

The Court: All right, you have made your point. Anything else?

Mr. Lowenberg: That is all.

The Court: Thank you.

(Witness excused.)

The Court: Both sides rest?

Mr. Lowenberg: Yes, I rest, Judge.

May I make a motion in the absence of the jury?

The Court: Yes. We will excuse the jury a minute.

Motion to Dismiss Indictment

(At this point the jurors left the courtroom and the following proceedings took place in the absence of the jury:)

The Court: Excuse me, before you start, Mr. Lowenberg, this exhibit, Mr. Monroe—

Mr. Monroe: Yes, sir?

The Court: —Exhibit No. 1. I admitted only the part that discloses the serial number of the bill.

(256) Mr. Monroe: Yes, your Honor.

The Court: If you propose to exhibit to the jury you have to eliminate the rest of it. Now, you can do what you want.

Mr. Monroe: Very well.

The Court: But the jury should not have it in its present form.

Mr. Monroe: Yes.

The Court: All right, Mr. Lowenberg, your motion.

Mr. Lowenberg: If your Honor pleases, I move to dismiss the indictment and direct a verdict of acquittal upon the ground that the Government has failed to make out a prima facie case against this defendant, and also upon the ground that now that I have rested, as a matter of law they have not established the guilt of this defendant beyond a reasonable doubt.

Now, I will submit to your Honor that the Court of Appeals in this case has declared that the evidence was conclusive as to entrapment.

The Court: As to the last trial, Judge Hand said that.

Mr. Lowenberg: Was conclusive as to entrapment.

The Court: No, he said it was conclusive as (257) to inducement.

Motion to Dismiss Indictment

Mr. Lowenberg: As to inducement, correct.

The Court: Yes.

Mr. Lowenberg: And he went on to say—

The Court: Well, I am quite familiar with the opinion. Your argument is that I am bound by it.

Mr. Lowenberg: I say this to your Honor, that the evidence establishes here as a matter of law that this defendant was induced and entrapped.

The Court: That is the basis for your motion for a directed verdict?

Mr. Lowenberg: Correct.

The Court: Yes.

Mr. Lowenberg: And upon the further ground that the additional evidence that the Government tried to supply in this case, which was not supplied in the first trial, showing the previous convictions of this defendant in 1942 and 1947, one being nine years old and—

The Court: 1946 I think.

Mr. Lowenberg: Or 1946, one, the 1942 conviction, being nine years before this event contained in this indictment; and the other being five years before the event, which certainly does not show or establish (258) any current dealings on the part of this defendant at the time that the Government charges he sold to a narcotic agent in 1951 the narcotics in this case.

In the absence of that testimony I say to your Honor that; as a matter of law, the entrapment has been established, there is no question about that, because Kalchinian said he approached him two or three times; he started the conversation about narcotics; he knew that the defendant was up to this doctor's office for a cure, and he was up there for a cure; that they went to the same pharmacy to

Motion to Dismiss Indictment

have their prescriptions made up; they then discussed the treatment that they were receiving at the doctor's office.

I say if the Government is permitted to establish a prima facie case on that kind of evidence then I would say to your Honor this:

It will be notice to every addict in the City of New York don't go near a doctor's office for a cure; don't try to rehabilitate yourself; continue on with the use of narcotics, because if you go up there you might find an informer for the Government who will induce you when you are weak, induce you and entrap you into the sale of narcotics.

Now, certainly, these two convictions in 1942 (259) and 1946, because nine years and five years before the event contained in this indictment, they cannot be any evidence whatsoever of any dealings on the part of this defendant in narcotics at the time of the indictment.

The Court: That is an argument that you can make to the jury. I have already admitted it in evidence.

Mr. Lowenberg: I submit, Judge, that it is an argument that your Honor has to consider, too, on the question of whether, as a matter of law, there is a reasonable doubt in this case, and as to whether or not the Government has made out a prima facie case before your Honor can submit it to the jury.

If I were convicted of the sale of narcotics and were a defendant, let us assume—

The Court: Do you have any other argument?

Mr. Lowenberg: —and if 20 years from now I am arrested, would you say that the Government has a right to say that I was convicted ten years back

Motion to Dismiss Indictment

if twenty years later I am engaged in the sale of narcotics?

I submit, as a matter of law, that there is a reasonable doubt and I submit further that the Government has failed to make out a prima facie case, and I ask your Honor to direct a verdict of acquittal.

(260) The Court: I will deny both motions.

Mr. Lowenberg: Exception.

The Court: Are you agreed that you would require 45 minutes?

Mr. Lowenberg: That is right.

The Court: 30 minutes for you?

Mr. Monroe: 30 minutes or perhaps less, your Honor.

The Court: All right, then, we will take a short recess now.

Tell me before doing so, the 1942 conviction was for a sale?

Mr. Monroe: A sale, yes.

The Court: And 1946?

Mr. Monroe: Possession.

The Court: Thank you. 1942 was for a sale and 1946 for possession. That is what you said, isn't it, Mr. Monroe?

Mr. Monroe: Yes.

The Court: '42 sale and '46 possession.

Mr. Monroe: Yes, sir.

The Court: The record should indicate that I have returned the written requests to charge to both counsel with my endorsements on them.

(261) Mr. Lowenberg: And your Honor noted that exception, that is, my exception to the first request to charge.

The Court: I will do that later, or you can do so.

Summation for Government

Mr. Lowenberg: All right, sir, but just for the purposes of the record at this time.

The Court: Yes.

You may proceed, Mr. Lowenberg.

(Mr. Lowenberg then proceeded to make the closing address to the jury on behalf of the defendant.)

(Mr. Monroe then made a closing address to the jury on behalf of the Government.)

(During the course of Mr. Monroe's summation the following statement during the course of the summation was made by Mr. Monroe to which Mr. Lowenberg took exception as follows:)

Mr. Monroe: This defendant was no neophyte in the trade. He was predisposed mentally. He had the pre-existing purpose to commit this crime, and that is shown by the record of his prior conviction in 1942 and—

Mr. Lowenberg: That is objected to, if your (261-A) Honor pleases.

The Court: You have an exception.

Mr. Lowenberg: I ask the Court for a ruling.

The Court: I say you may have an exception.

Do you want a recess now, madame, and gentlemen now that the summations are concluded? I will take about 15 or 18 minutes for my charge.

The Jurors: No.

(262)

CHARGE OF THE COURT

(MURPHY, J.)

The Court: Madame and gentlemen of the jury:

First I want to thank you for being so courteous in your attention to this rather short but interesting case. And I notice, too, from your jury cards that there are a few of you who have had no prior experience as jurors in criminal cases but I am sure by now that you must realize that in the trial of a lawsuit, particularly a criminal lawsuit, there are three separate groups whose joint action administers justice.

The lawyers took an oath that they would represent their clients to the best of their ability. Mr. Monroe represents the Government and Mr. Lowenberg his client, and they took an oath that they would present the evidence in this case to the best of their ability.

And my job is to watch over the trial and to pass upon the admission of evidence and the questions of law, and I have done that, or at least I hope I did, pursuant to the oath that I took.

And it must be obvious to you by now that the third member of this group is the jury yourselves. You will recall that when you were sworn you took an oath to pass upon the facts in this case based upon the law (263) as I give it to you. You are not to concern yourself with emotion, bias, or prejudice, and you are not to concern yourself with any possible punishment that might be meted out, because then you would be infringing on my function.

If I made a mistake in passing upon the questions of law that were involved, that mistaken can be corrected, but if you make a mistake on the issues of fact in the case that mistake can never be corrected.

And so we come to the most important part of the case,

Charge of the Court

the matters that are part of the case that you people are going to play, for you and you alone are going to decide whether Mr. Joseph George Sherman is guilty or not guilty of the crime charged in the indictment. And I know that you will approach that problem with all of the open-mindedness and fairness that you can muster, because it represents a civic duty that has no equal.

What I propose to do in this, my charge, or as they call it in England the Judge's summation, is to explain to you (1) what the indictment is; (2) explain what the law is relating to those charges, and then tell you what, in my opinion, are the important facts, and (264) after that to tell you what issues of facts you must decide, and finally to give you some general rules in an effort to help you come to a decision in this case.

I am going to read the indictment to you, but before I do that I must caution you that an indictment is merely a charge by a grand jury accusing a person of a crime. It has no other value at all. It brings the man into court, in this particular case Mr. Sherman, who has denied the charges by pleading not guilty. He is presumed to be innocent, so when I read the indictment please do not consider it any evidence at all. It is merely the charge against this man.

Now, the indictment is in three counts and that means it contains three separate charges of a crime. It is phrased in identical language but each count is different as to the date and the quantities of the alleged drug. I, therefore, will read verbatim only the first count and paraphrase the remaining two, and it says:

“The grand jury charges:

1. On or about the 1st day of November, 1951, in the Southern District of New York”—and that is this district —“Joseph George Sherman, the defendant, unlawfully,

Charge of the Court

wilfully, and knowingly did receive, conceal, (265) sell; and facilitate the transportation, concealment, and sale of a certain narcotic drug, to wit diacetyl morphine hydrochloride, a derivative and preparation of opium, commonly known as heroin, which together with certain adulterants weighed approximately 19 grains, after said heroin had been imported and brought into the United States contrary to law, knowing that the said heroin had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and cocoa leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited."

Count 2 charges the same crime except that it says that it took place on the 7th of November, 1951, and that the amount of the alleged drug, heroin, was 2 grains.

The third count is also in identical language except that the date is given as the 16th of November, 1951, and the amount of the alleged drug was 13 grains.

Now, Congress has made the acts charged in the indictment a crime and has also provided that whenever on trial for a violation of this subdivision the defendant is shown to have had possession of a narcotic drug, such (266) possession shall be deemed sufficient to authorize a conviction unless the defendant explains the possession to the satisfaction of the jury.

As I understand the evidence in this case, three narcotic agents testified that they observed on the dates mentioned in the indictment the defendant passing something to Mr. Kalchinian, and that shortly thereafter on each occasion Kalchinian handed over to an agent a glassine envelope containing a white powder.

These three packages were placed by the agents, according to their testimony, in envelopes and delivered

Charge of the Court

to the Government chemist for analysis. The records introduced by the Government indicate that the contents in each of these packages was analyzed by a chemist and found to contain herein, and that subsequently in 1953 they were sent to the disposal unit of the Bureau of Narcotics and destroyed.

In addition to the testimony of the three Government agents, the Government called Mr. Kalchinian who testified that he was arrested by the Federal narcotic agents in June of 1951 and released without bail on his promise to cooperate with the Narcotics Bureau.

Thereafter he testified that he met at Dr. Grossman's office the defendant, where he was receiving (267) a cure for his addiction. He said that the defendant told him that he, too, was being treated by the same doctor for addiction and they met not only at the doctor's office but also at some nearby pharmacy where they were having their prescriptions filled.

It is Kalchinian's testimony, as I recall it, that in the beginning they merely exchanged greetings but that subsequently they started to talk about their various experiences as addicts, and eventually Kalchinian asked the defendant about the source of his supply and after two or three attempts to draw the defendant out the defendant agreed to get him some drugs, and they established a modus operandi by means of which the defendant called Kalchinian at his place of business and arranged for a time of meeting at a previously agreed rendezvous.

Kalchinian further testified that commencing about the first part of September he received a phone call from the defendant and met him the following day and received and paid for some narcotics.

At about the end of October Kalchinian testified that he went to the Bureau of Narcotics and saw Mr. Melikian and another agent named Sam Levine and, as a result of

Charge of the Court

talking to these agents, when the defendant (268) called him on November 1st he told Melikian about the arranged meeting and went with the agents to a nearby corner, was searched and given \$15 and met the defendant and received the package and paid him the \$15, and then turned the package over to the agents.

He testified that between that date and November 7th he received other phone calls from the defendant, met him and received narcotic drugs but didn't tell the agents about these purchases. He did, however, tell the agents on November 7th and the same procedure was followed, and it was his testimony that he paid the defendant \$15 for the purchase on that date with money supplied by the agents.

He testified that after that date and before November 16th he received other calls and had other meetings with the defendant, at which times he received narcotic drugs but that he didn't tell the agents about these intervening buys. On November 16th he received another call from the defendant and this time he told the agents, and they gave him the money and he made the purchase that you have heard testified to.

It was his testimony, as I recall it, that the Government recommended to the sentencing Judge that he be given a suspended sentence because of his cooperation (269) and that evidently took place when he was sentenced in 1952.

On cross examination he told us that his occupation is that of a photographer and that he has not used drugs in the last five years and has exhibited his arms to those jurors who wished to see them and has denied, when questioned by defense counsel, that the punctures or scars or blisters are the result of any recent injections.

He admitted using drugs in 1951, when he was a night clerk and manager in a hotel receiving about \$60 to \$65

Charge of the Court

a week in salary and spending about \$30 a week for drugs. He explained that he borrowed money from money lenders, shylocks and banks and denied to himself many necessities.

As I understand his testimony, he admits and has previously admitted that he agreed to cooperate with the Narcotics Bureau in an effort to help himself, and that he made three cases for the Bureau.

There was considerable testimony on the issue of whether or not he asked the defendant to supply him with drugs or whether he asked the defendant to put him in touch with the defendant's source of supply. I leave it to you as to what the conversation was. Evidently it took several attempts to draw the defendant (270) out in order to make him agreeable to get the drugs and they evidently agreed on a price of \$15, being half of the \$25 cost plus \$2.50 for taxicabs and the defendant's trouble.

The defendant by cross examination has offered evidence to prove that if any drugs were sold by the defendant to Kalehinian he was induced to do so by the Government; that is, through the Government's special employee Kalchinian and that thereafter he was entrapped into making such sales, if you find as a fact that the defendant did sell the drugs charged in the indictment.

In this connection I have admitted evidence tending to prove the defendant's record of prior convictions in this court in 1942 and 1946 for the sale and possession of narcotics respectively. These convictions, if you believe they relate to the defendant, have been offered by the Government to show the disposition or willingness on the part of the defendant because both of these matters, inducement and willingness, are important on the issue of entrapment, a term which I will explain.

But bear in mind, even though you may find the defendant may have been convicted for narcotics previously,

Charge of the Court

you may not and cannot find this defendant guilty because (271) of those previous convictions of narcotics.

The defendant in addition to his plea of not guilty has offered testimony by way of cross examination which, if believed by you, would constitute the defense of entrapment.

It is undoubtedly true that the creation by the Government employee of the opportunity or facility for the commission of a crime does not defeat the prosecution. Artifice and stratagem can be employed to catch those engaged in criminal enterprises. The appropriate object of this permitted activity is to reveal a criminal design, to expose illicit traffic and other offenses, and thus disclose would-be violators of the law.

But when the criminal design originates with Government officials or employees and they implant in the mind of an innocent person the disposition to commit an alleged offense and induce its commission in order that they may prosecute, then in such an event a defendant cannot be found guilty but must be acquitted, and this is so because the defendant is entrapped into committing a crime, and that shocks public decency.

So in this case, concerning the defendant's contention that he was entrapped by the Government employees and hence not guilty of the crimes here charged, (272) there are two questions of fact that you must decide:

1. Did Mr. Kalchinian, the Government special employee, induce the defendant to commit the offenses charged in the indictment?

2. If he did was the defendant ready and willing, without persuasion, and was he awaiting any propitious opportunity to commit the offenses?

On the first question; that is, the inducement, the defendant has the burden of proof. On the second question,

Charge of the Court

the defendant's willingness or predisposition, the burden is on the Government.

And bear in mind that even if you believe that the defendant has been previously convicted of narcotics, the defendant may still have been induced and entrapped to commit the crime charged here. And if you find that to be so you must acquit the defendant despite his previous convictions.

In short, on this issue of entrapment, if you believe that the defendant was induced by Kalchinian to commit the offenses charged in the indictment, you must acquit unless you find that the Government has sustained its burden of proving that the accused was ready and willing without persuasion, and was waiting for a propitious opportunity to commit the offense.

(273) Now, in an effort to help you come to a decision on these matters, there are a number of rules which are the result of centuries of experience, and one of the first rules, madame and gentlemen, is that you and you alone are the sole and exclusive judges of the facts, of the credibility of the witnesses, and the weight to be given to their testimony.

What counsel for either side has said, or, in fact, what I say about the facts is not controlling on you at all. You can disregard what I say and you can disregard what counsel say.

Moreover, you must not draw any inferences for either side in this case because of rulings that I have made in the trial. These rulings relate to matters of law which are outside of your province.

You must not imply from the fact that because I asked questions from time to time that I have a feeling or an opinion in the matter. I asked a few questions in order to clear up what I thought was some difficulty. I can tell you honestly I have no feeling one way or the other. You

Charge of the Court

must make up your own minds about the facts without being influenced in the slightest from what I have said.

How do you determine the credibility of the (274) witnesses? You do that by the same method that you employ in your day-to-day affairs. It does not necessarily mean that you are passing upon whether somebody is lying or not. Credibility is something more. You and I frequently decline to believe someone that we would not accuse of lying. We decline to believe him or her because we feel that his or her sincerity is not of the highest, or that they have not an accurate recollection, or because we think he or she has a biased or an interest and quite unintentionally colors the judgment.

You can consider the conduct of the witness on the stand. Was he frank or evasive? Was he biased or impartial? Was he interested in the result? Did he testify falsely to a material fact? If you believe that a person testified falsely to a material fact you can disbelieve his whole testimony or disbelieve the part that you decide not to believe. It is entirely up to you.

Now, you heard about the burden of proof, and this is important. The defendant, as I said before, is presumed to be innocent, and the fact that he has been accused of a crime by the grand jury does not destroy that presumption.

The defendant himself has not testified. Under (275) our system of law he has a perfect right to remain silent and not testify, and such fact shall not be considered against him or relieve the Government of its burden of proof to prove that the defendant is guilty beyond a reasonable doubt, nor shall you draw any conclusions or raise and prejudices or inferences against the defendant by reason of the fact that he did not testify.

The burden of proof, in the sense of responsibility of persuading you madame and gentlemen rests upon the

Charge of the Court

Government. The quantum or the measure of proof necessary before you may lawfully find the defendant guilty is referred to as proof beyond a reasonable doubt.

And by "reasonable doubt" I do not mean a possible uncertainty. Proof beyond a conceivable doubt cannot be attained in a world of actuality. Neither is a reasonable doubt any decision arbitrarily reached by a juror because of a reluctance to perform an unpleasant task, nor is it based upon a natural sympathy which we all have for others.

Reasonable doubt most clearly signifies one which an average person of ordinary prudence has after weighing all the evidence carefully, and by weighing I do not mean balancing according to volume the testimony (276) or the number of exhibits or witnesses, but rather a determination based upon the convincing force of the testimony. You must be governed by the quality and not necessarily the quantity of proof. If the Government sustains the burden of proof on the issues of fact which I have already explained to you, you may lawfully find the defendant guilty of the crime charged.

Now just one final word. I suppose you all know that in the Federal Court all verdicts in civil and in criminal cases must be unanimous. In the State Court they have a little different system, but here in the Federal Court the verdicts must be unanimous. That means that you can find the defendant guilty or not guilty on each of the three counts. In other words, your foreman when he reports back must tell us how you find on count 1, on count 2, and on count 3, and that is was the defendant guilty or not guilty on each of these separate crimes charged in the indictment.

I suppose you know, too, that when you get into the jury room you can ask for and we will send in to you any of the exhibits that you desire.

Colloquy

Are there any exceptions, Mr. Monroe?

Mr. Monroe: The Government has no exceptions.

The Court: Mr. Lowenberg?

(277) Mr. Lowenberg: I was just going to note my exception to your Honor's refusal to charge my request No. 1.

The Court: Fine.

Will you swear the Marshals, please?

(Marshals sworn.)

The Court: We have arranged to have lunch furnished to you at Government expense and I hope you enjoy it. You may follow the Marshals.

(At this point (12:46 P.M.) the jury left the courtroom in the presence of the Marshals, being escorted to lunch first before deliberating, then returned to the court house to commence deliberations at approximately 2 P.M.)

(At 2:10 P.M. the following proceedings took place in chambers with both counsel present:)

The Court: The jury has sent in a note reading:

"All exhibits—copy of indictment."

Counsel have gone over the exhibits and at defendant's request in connection with Exhibits 11 and 10, is it?

Mr. Monroe: 11 and 10.

Mr. Lowenberg: 11 and 10.

(278) The Court: 11 and 10, I have on consent of Government counsel reduced the size of those exhibits by giving to the jury only the commitment on each one, and have not given to the jury exhibits marked 10-A and 11-A for identification, which under my ruling should have been

Colloquy

included but I see that they contain a recommendation as to parole and used the language "In view of the defendant's long criminal record," and I think they should not be exhibits in evidence. Accordingly they are marked only as exhibits for identification and are not to be given to the jury.

(Government Exhibits previously marked 10-A and 11-A in evidence now marked Government Exhibits 10-A for identification and 11-A for identification.)

The Court: Counsel have agreed on the clean copy of the indictment and Exhibit 1 has been cut with a scissors so as to exhibit to the jury only the part referring to the agent's notation of the serial numbers of the two bills; namely, the \$10 and \$5 notes.

Is everything else all right, gentlemen?

Mr. Lowenberg: I am just looking through it, Judge.

The Court: Yes.

Mr. Lowenberg: I suggest that on these reports, (279) Judge, it was understood that these remarks such as 20th Street should be covered.

The Court: I do not recall any such understanding.

Mr. Lowenberg: I objected to the remarks contained therein.

Mr. Monroe: But the Judge pointed out that they were part of the remarks contained on the other exhibits already admitted.

The Court: Yes, and I will let the jury have them.

Mr. Lowenberg: I take it that this will be cut out (indicating)?

Mr. Monroe: Yes.

The Court: All right.

(Thereupon the exhibits were taken by the Marshal to the jurors.)

*Verdict**Jury Polled*

(At 2:45 P.M. the jury returned to the courtroom and the following proceedings took place:)

The Clerk: Jurors will please answer as their names are called.

(Roll of jurors called.)

The Clerk: Mr. Foreman, have you agreed upon a verdict?

(280) The Foreman: We have.

The Clerk: How say you as to count 1, count 2, and count 3?

The Foreman: We find the defendant guilty on all three counts-unanimously.

The Court: All right.

Mr. Lowenberg: May I have the jury polled, Judge?

The Court: Yes.

(Jury polled and each juror indicated in the affirmative that the above was his verdict.)

The Court: All right, madame and gentlemen of the jury you are excused with the thanks of the Court until—

The Clerk: Tomorrow morning at 9:30, your Honor.

The Court: I thought I would give you the weekend off, but it seems that there are other orders here that require your presence tomorrow morning at 9:30 in the jury room on the first floor.

(At this point the jurors left the courtroom and the following proceedings took place in the absence of the jury:)

Colloquy

Mr. Lowenberg: May I, if the Court please, (281) reserve all motions until the day of sentence? There will have to be an information filed here I assume.

Mr. Monroe: That is correct. The Government has to file an information.

The Court: What date will be agreeable?

Mr. Monroe: I can get it done tonight and file it.

I think the defendant should be committed.

Mr. Lowenberg: Oh, I am going to ask for a continuance, Judge.

The Court: Let us first agree as to the day of sentence. Do I need a probation report or not?

Mr. Monroe: If there was a prior one, Judge, it is five years old by this time.

The Court: Is the man an addict now?

Mr. Lowenberg: Pardon me?

The Court: Is the man an addict now?

Mr. Lowenberg: I don't know, Judge. I have not inquired.

The Court: You don't know?

Mr. Lowenberg: I have not inquired.

The Court: All right, thank you. We will have a probation report ordered, and I guess they need two weeks anyhow, don't they?

(282) Mr. Monroe: Yes, sir.

The Clerk: Three weeks, and only two weeks if the defendant is remanded.

The Court: Does the man live in the city?

Mr. Lowenberg: Pardon me?

The Court: Does the man live in the city?

Mr. Lowenberg: Yes, sir, he lives in the city. He owns a rooming house, a 50 rooming house on West 17th Street. He lives in Manhattan.

The Court: Well, Monday, the 25th, is not quite three weeks but would that be agreeable?

Colloquy

Mr. Lowenberg: That is agreeable to me.

How about you, Mr. Monroe?

Mr. Monroe: Yes, that is agreeable.

The Court: I take it that you are going to file an information within that time.

Mr. Monroe: Yes, your Honor.

The Court: Do you anticipate contesting that, because, if so, I would have to adjust my calendar.

Mr. Lowenberg: No, I do not anticipate contesting it, but under the law they have to file such an information, Judge.

The Court: All right. What bail is the man on now?

(283) Mr. Lowenberg: I don't know his prior conviction was reversed by the Court of Appeals, but he was always available, Judge. He was available even after the conviction. He was in town and he never fled then.

The Court: I see here on March 5, 1952, that bail was continued, but it does not tell me what bail it was.

Mr. Lowenberg: I will see if he knows.

Do you know what your bail was?

The Defendant: 3,500.

Mr. Lowenberg: What?

The Defendant: 3,500.

Mr. Lowenberg: \$3,500 he advises me, Judge.

The Court: And is that still the outstanding bail? Have you been paying premiums on that?

The Defendant: I think so.

The Court: Can't you call your office to find out whether the bail is still outstanding?

Mr. Monroe: I will have to call the Criminal Clerk's office.

The Court: I see a note here which says, "February 17, 1953; case marked off trial calendar and bail bond discharged on motion of Government."

Mr. Monroe: I think that is the status of it.

Colloquy

(284) I will call the clerk and ask him to check file 118902 and tell me whether or not there is any bail outstanding on that.

The Court: Won't you have to give him the C number?

Mr. Monroe: They have it by our file number.

The Court: Is your recollection still strong that you have been paying premiums the last three years on the \$3,500 bail bond?

The Defendant: Beg your pardon, Judge?

The Court: Are you still paying premiums as you have been for a number of years?

The Defendant: It goes the same way.

Mr. Lowenberg: I do not believe he has to pay premiums every year, Judge. I believe once the bond is posted it runs until the end of the case.

Mr. Monroe: There is no bail at the present time.

Mr. Lowenberg: May I ask your Honor to set bail pending sentence? The defendant has always appeared, and in view of the fact that bail had been discharged he could have fled this jurisdiction long before this case was tried. As a matter of fact, the reversal of the conviction was had in 1952 and I might say, your (285) Honor—

The Court: Is he a married man?

Mr. Lowenberg: He is a married man, Judge.

The Court: Living with his wife?

Mr. Lowenberg: Yes, living with his wife and he lives on West 17th Street, Manhattan. That is where the rooming house is located, and he has already expressed a desire to me that in the event that there is a conviction that he wanted me to undertake an appeal from that judgment of conviction as happened the last time.

The Court: Are you addicted now to drugs, Mr. Sherman?

The Defendant: No, your Honor.

The Court: How long have you been off?

Colloquy

The Defendant: A couple of years.

The Court: Do you want to be heard as to the question of bail and/or commitment, Mr. Monroe?

Mr. Monroe: Judge, under the circumstances, in view of the length of time that this case has been coming on and the fact that the defendant has appeared, I think that there should be bail and it should be substantial bail.

The Court: What do you have in mind?

(286) Mr. Monroe: At least \$10,000, if your Honor pleases.

Mr. Lowenberg: Judge, that would be prohibitive as far as this defendant is concerned. He was out on \$3,500 bail. That was set I believe by the Court of Appeals, and he was out on bail when the appeal was argued and he was available then.

The Defendant: There is no bail and still I came in here all the time without bail.

Mr. Lowenberg: Wait a minute.

The Court: You have retained this man.

The Defendant: I am bringing out about the bail. There was no bail and still I came in just the same.

Mr. Lowenberg: Wait until I get through here, will you please?

The Defendant: Even though there was no bail I always appeared.

The Court: Yes. I will fix bail at \$3,500.

Mr. Lowenberg: \$3,500, Judge?

The Court: Yes.

Mr. Lowenberg: May we have time to post the bail? It is now three o'clock. I don't know how much time the bondsman will be required to have to (287) post bail, but can we post it, or is it possible to post it by five o'clock? I don't know if the Commissioner will be here then.

Colloquy

Mr. Monroe: I don't know whether the Commissioner will be here, but somebody will be down at the Marshal's office until that time.

Mr. Lowenberg: Or tomorrow.

The Court: The man should be in custody until the bail is furnished, and I should not think it would take more than an hour for one of the companies to write the bond.

Mr. Lowenberg: May I step out with the defendant for a minute and call the bondsman, and I will know exactly where I am at, Judge?

The Court: All right, I will wait inside.

(Short recess.)

Mr. Lowenberg: We are going down to the Commissioner's office.

(Adjourned to June 25, 1956, at 10:30 A.M.)

Judgment

(323) UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C 137-331

On this 25th day of June, 1956 came the attorney for the government and the defendant appeared in person and by counsel,

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of unlawfully, wilfully and knowingly receiving, concealing, selling and facilitating the transportation, concealment and sale of heroin (Title 21, Secs. 173-174 USC) as charged in counts 1-2-3, and the defendant, duly represented by counsel, having admitted he is the same person previously convicted on two separate Federal Narcotic Violations, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS on each of counts 1, 2 and 3 to run concurrently. Fined \$1. on each of counts 1-2-3. Fines remitted.

Motion for bail pending appeal denied.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

THOMAS F. MURPHY,
United States District Judge.

Notice of Appeal

(302)

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. C 137-331

[SAME TITLE]

Joseph George Sherman
264 West 17th Street, New York City, N. Y.

Appellant's Counsel:

Henry A. Lowenberg
51 Chambers Street, New York City, N. Y.

The offenses with which the appellant was charged was the Unlawful Sale of Heroin.

The appellant, Joseph George Sherman, was sentenced to ten (10) years on each count in the indictment to run concurrently, fine One Dollar, fine remitted.

Sentence was imposed on June 25, 1956, by Judge Thomas F. Murphy, and Judgment was entered on the same date.

The appellant, Joseph George Sherman, is now confined to the Federal House of Detention, West Street, New York City, N. Y.

The above named defendant, Joseph George Sherman, hereby appeals to the United States Court of Appeals for the Second Circuit from the above stated judgment.

Dated: New York, N. Y.

June 26, 1956

JOSEPH GEORGE SHERMAN
by his Attorney

HENRY A. LOWENBERG
51 Chambers Street
New City, N. Y.

[fol. 202] IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C. 137-331

UNITED STATES OF AMERICA

v.

JOSEPH GEORGE SHERMAN

Before: HON. THOMAS F. MURPHY, D.J., and a Jury.

New York, June 4, 1956

Stenographer's Minutes

[fol. 203] OPENING STATEMENT BY DEFENSE COUNSEL

New York, June 4, 1956.

Present: Mr. Monroe, Mr. Lowenberg.

Mr. Lowenberg: If your Honor pleases, lady and gentlemen of the jury:

We intend to prove through the Government's own informer that this informer had been convicted for the sale of narcotics and to save himself from jail he decided to assist the Bureau of Narcotics and had the United States Attorney plead in his behalf when he appeared for sentence.

We intend to show that this defendant was a narcotic addict who was up at a Dr. Grossman's office for a cure to get rid of this habit and so this informer was also present for a cure. They met by accident, by chance.

This informer, building up cases for the Department of [fol. 204] Narcotics, decided that he would dupe this defendant although this defendant was not willing and

ready to perform the act, that he would induce this defendant, entrap him into a division between them of narcotics for no profits whatsoever.

The doctor sent this defendant and the defendant to the same pharmacy to have prescriptions made up, and they were there for a cure. Knowing that this defendant was there for a cure, this gutter rat informer approached him and asked him whether he could get any narcotics. The first time he did not answer him, and the second time he was approached again. The defendant put him off and said, "I am trying to get them for you."

The informer said to him, "We will split it between us. You will use it and I will use it" when he realized that this man was up there for a cure.

In this manner, the defendant after being pressured by this informer said to him, "Give me your telephone number. I will see what I can do." And one day he called him up and he said, "I have some stuff," and it was \$25, which was the amount involved, and when the defendant met him, the defendant said to him, "Your share is twelve and a half [fol. 205] dollars and so much for taxi fare. Just give me that," and they shared it between them.

And we will show you that that happened once, twice, three times, and during all this time this informer was in contact with the Bureau of Narcotics, taking a helpless addict who was at a doctor's office for a cure to rid himself of that habit, and inducing him against his will to violate the narcotics laws.

Then we will show you that the agents arrived at the scene and observed this pass of narcotics. The Government will show you that. Of course, they did not know what was going on between Calchinian and this defendant; they merely appeared on the scene.

Well, when Calchinian always went down there and said, "I will build up a case for you," then on the last occasion the informer, Calchinian, was given some marked money to pay for his end of the narcotics, for his end without profit, and he handed this defendant the marked money, and then they followed this defendant into his rooming house, a rooming house that he manages and said to him, "You are under arrest," found the marked money on him.

They will testify that they found no narcotics in the defendant's premises although they expected to, and they [fol. 206] will tell you the defendant told them, and they found nothing to the contrary, that he was earning his living in this rooming house.

This defendant would not be on trial today lady and gentlemen if it were not for the despicable actions of an addict; of an informer, who would jeopardize anybody's liberty, and it could have been anybody, in order to make a case for the Federal Bureau of Narcotics, because he was under an obligation. Just keep that in mind. This defendant was up at a doctor's office as an addict for a cure, being approached by this contemptuous, scurrilous informer who induced him after speaking to him a few times about getting narcotics so that they could divide it between them.

Now, it is our contention that not having been a sale, and with the tremendous profit in narcotics, as you well know about, that this contemptible, scurrilous informer was out to frame this defendant, to induce him to commit the crime so he could come back to the Bureau of Narcotics and say, "Here I delivered another case for you in payment for my liberty."

I thank you.

[fol. 207] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 208] IN DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF NEW YORK

C 112/103

Violation of U.S.C. Title 21

Secs. 173-174 U.S.C.

" 2553-2554 I.R.C.

Unlawful sale of smoking opium

UNITED STATES OF AMERICA

v.

JOSEPH GEORGE SHERMAN alias Jack, alias Spunky.

JUDGMENT AND COMMITMENT

On this 10th day of June 1942, upon the proceedings heretofore had herein and on motion of the United States Attorney, It Is by the Court

Ordered and Adjudged that the defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution to be designated by the Attorney General or his authorized representative for the period of

Eighteen Months on counts 1-2-3 to run concurrently.
Fined \$1.00 on count 3. Fine remitted. The Court recommends that defendant be sent to the Narcotic Farm at Lexington, Ky.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Henry W. Goddard, United States District Judge.

A True Copy. Certified this 10th day of June 1942.

George J. H. Follmer, Clerk.

[fol. 209]

RETURN

I have executed the within judgment and commitment in the manner following: On June 10 1942 I delivered said Joseph G. Sherman to the Warden of Detention Head-

Name of Prisoner

Keeper or other officer.

Jail or other Institution

quarters Temporarily pending transfer to the institution herein designated for the service of sentence; and on

19.....

I delivered said

Name of Prisoner

to the

at

Warden, Superintendent, etc.

Jail or other Institution

the institution designated, together with certified copy of the within Judgment and Commitment, for transportation to U.S.P.H.S. Hosp. Lexington, Ky.

James E. Mulcahy, U. S. Marshal, by John A. Brown,
Deputy:

(Stamp) U. S. District Court—Filed Jun 26 1942—S. D.
of N. Y.

[fol. 210] IN DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK

No. C 124/58

UNITED STATES OF AMERICA

v.

JOSEPH G. SHERMAN

JUDGMENT AND COMMITMENT

On this 24th day of February, 1947 came the attorney for the government and the defendant appeared in person and¹ by counsel

It Is Adjudged that the defendant has been convicted upon his plea of² guilty of the offense of unlawful purchase of narcotics Sec 2553 (a) IRC as charged³ and the court

having asked the defendant whether he has anything to say why judgment should not be pronounced; and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the imposition of sentence suspended and defendant placed on probation for a period of Two Years subject to the standing probation order of this court, conditioned upon his surrendering not later than 3/10/47 to the U.S.P.H.S. Hospital, Lexington, Kentucky, and there voluntarily surrendering for treatment of drug addiction and remaining there until officially discharged as cured by the officials of that institution and thereupon return to the Probation Department, Southern District of New York, for further report and disposition.

Bail Continued.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Edward A. Conger, United States District Judge.

¹ Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

² Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

³ Insert "in count(s) number" if required.

⁴ Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of fine or fine and costs, or until he is otherwise discharged as provided by law.

⁵ Enter any order with respect to suspension and probation.

⁶ For use of Court wishing to recommend a particular institution.

[fol. 211]

U. S. Public Health Service Hospital
Lexington, Kentucky

This is to certify that probationer patient, Joseph Sherman, our No. MD.4412-Lex., was admitted to this hospital March 10, 1947.

W. K. Biggerstaff, Assistant Registrar

(Stamp) U. S. District Court—Filed March 13, 1947—S. D.
of N. Y.

[fol. 212] IN UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

C.137-331

UNITED STATES OF AMERICA, Appellee,

v.

JOSEPH GEORGE SHERMAN, Appellant.

NOTICE OF MOTION

Sir:

Please Take Notice that upon the annexed affidavit of Malcolm Monroe, Assistant United States Attorney, sworn to the 28th day of December, 1956 and upon Exhibit A annexed thereto, the undersigned will move this court upon the submission hereof and of any papers in opposition hereto, to be submitted not later than January 4, 1957, at the office of the Clerk of the Court at the United States Courthouse, Foley Square, New York, N. Y., for leave to amend and supplement the record by adding thereto the transcript of the appellant's opening statement to the jury upon the trial of this case.

Dated: New York, N. Y., December 28, 1956.

Yours, etc., Paul W. Williams, United States Attorney for the Southern District of New York, Attorney for Appellee, Office & Post Office Address: United States Court House, Foley Square, New York 7, N. Y.

To: Henry A. Lowenberg, Attorney for Appellant, 51 Chambers Street, New York, N. Y.

[fol. 213] UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

C 137-331

UNITED STATES OF AMERICA, Appellee,

v.

JOSEPH GEORGE SHERMAN, Appellant.

AFFIDAVIT

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, ss.:

Malcolm Monroe, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul W. Williams, United States Attorney for the Southern District of New York and am in charge of the above-captioned case. I make this affidavit in support of the appellee's application to supplement the record herein by adding thereto the court reporter's transcript of the appellant's opening statement to the jury.

2. The appeal was argued on December 10, 1956 before the Honorables Swan, Medina and Waterman, Circuit Judges. The issues involve the propriety of introducing into evidence upon the Government's direct case the prior convictions of the appellant in rebuttal to the defense of entrapment.

3. Upon the argument, members of the court evinced concern as to the existence of an appropriate foundation for the introduction of such proof in the course of the Government's direct case. Counsel for the Government argued that in the posture of the case as it then appeared for retrial after prior reversal based upon entrapment, a sufficient foundation existed. It was also claimed, as a matter lying outside the record, that upon the opening [fol. 214] statement appellant's counsel had asserted a plea of entrapment and that the plea so made constituted a

sufficient foundation for the offer of proof in question. Appellant's counsel thereupon denied asserting such plea in his opening statement.

4. A copy of the court reporter's transcript of appellant's opening is annexed hereto as Exhibit A. The plea of entrapment is inherent in the entire opening. Particular reference, however, is made to the paragraph commencing at the bottom of Page 1 and concluded at the top of Page 2.

Wherefore, appellee's application to supplement the record by adding thereto said transcript of appellant's opening statement should be granted.

Malcolm Monroe, Assistant U. S. Attorney.

Sworn to before me this 28th day of December, 1956.

Jack W. Ballem, Notary Public, State of New York
(balance of stamp illegible).

Exhibit A omitted. Printed side page 202 ante.

[fol. 215] IN UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

No. 172—October Term, 1956.

Argued December 10, 1956 Docket No. 24342

UNITED STATES OF AMERICA, Appellee,

v.

JOSEPH GEORGE SHERMAN, Appellant.

Before: Swan, Medina and Waterman, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Thomas F. Murphy, Judge.

Defendant appeals from a judgment of conviction of selling narcotics, in violation of 21 U. S. C. Section 174. Affirmed.

Paul W. Williams, United States Attorney for the Southern District of New York, New York City (Malcolm Monroe and Maurice N. Nessen, Assistant United States Attorneys, New York City, of Counsel), for appellee.

Henry A. Lowenberg, New York City, for appellant.

[fol. 216] OPINION—February 4, 1957

MEDINA, Circuit Judge:

This appeal is from a judgment of conviction under an indictment charging sales of narcotics on three occasions in violation of 21 U. S. C. Section 174. The evidence established the following facts: appellant and one Kalchinian, both addicted to the use of narcotics, became acquainted as a result of meeting several times in the office of the physician whom they were consulting in an effort to cure their addiction and in the pharmacy to which they took their prescriptions to be filled. After several casual greetings, they began to discuss their experiences in the use of narcotics. In response to a question, appellant told Kalchinian that he was then purchasing drugs. Kalchinian, who was not responding well to treatment, informed appellant of this fact and requested an introduction to appellant's supplier. After two or three such requests, appellant stated that the man was going out of business and for this reason he could not introduce appellant to him. Upon Kalchinian's asking, "How can I then?" appellant said he might be able to get some drugs for him. To a subsequent inquiry appellant replied that he was working on it. Kalchinian asked how he could get in touch with appellant, but appellant suggested instead the following procedure. If and when he had drugs for Kalchinian he would telephone him and tell him what time to meet him. Appellant took Kalchinian's telephone number and designated a certain street corner as the meeting place. He said that he expected to purchase heroin at \$25 for 1/16 ounce and that he would let Kalchinian have half that amount for \$15, explaining that the

additional \$2.50 was for his cab fare and trouble. Kalchinian agreed to these arrangements, and several transfers took place. Later Kalchinian, who was awaiting sentence on a narcotic charge to which he had pleaded guilty and who had previously worked with the Federal [fol. 217] Bureau of Narcotics on two cases, for the first time informed the Bureau of his dealings with appellant.

On the three dates charged in the indictment, agents observed Kalchinian exchange \$15 for a small quantity of heroin contained in a glassine envelope concealed in an empty cigarette package. The government also proved, over appellant's objection, that he had twice before been convicted on narcotic charges: in 1942 for selling opium and in 1946 of possession of 720 grains of morphine in 5-grain capsules, 261 grains of heroin in six cellophane bags, and two ounces of opium in three jars.

The principal issues on this appeal revolve about the defense of entrapment. The Supreme Court has held "the controlling question" under this defense to be "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." *Sorrells v. United States*, 287 U. S. 435, 451. Thus, if it be shown without more that the defendant was induced by government agents to engage in the proscribed activity, no conviction may be had. *United States v. Masciale*, 2 Cir., 236 F. 2d 601; *United States v. Sherman*, 2 Cir., 200 F. 2d 880. But "the defense of entrapment is not simply that the particular act was committed at the instance of government officials. That is often the case where the proper action of these officials leads to the revelation of criminal enterprises." *Sorrells v. United States*, *supra*. "There is no entrapment when a purchase is made at the instance of the law officers where the seller is ready and willing, without persuasion and awaiting any propitious opportunity, to commit the offense." *United States v. White*, 2 Cir., 223 F. 2d 674.

On a prior appeal in the case at bar, *United States v. Sherman*, *supra*, Judge Learned Hand stated, page 882:

[fol. 218] "As we understand the doctrine it comes to this: that it is a valid reply to the defence, if the prose-

cution can satisfy the jury that the accused was ready and willing to commit the offence charged; whenever the opportunity offered. In that event the inducement which brought about the actual offence was no more than one instance of the kind of conduct in which the accused was prepared to engage; and the prosecution has not seduced an innocent person, but has only provided the means for the accused to realize his pre-existing purpose. The proof of this may be by evidence of his past offences, of his preparation, even of his 'ready complaisance.' Obviously, it is not necessary that the past offences proved shall be precisely the same as that charged, provided they are near enough in kind to support an inference that his purpose included offences of the sort charged."

On that appeal we set aside appellant's conviction because of error in the charge. This error was corrected on the second trial and the evidence was sufficient to warrant a finding "that the accused was ready and willing to commit the offence charged, whenever the opportunity offered." The jury was justified in regarding appellant's hesitancy as no more than prudent caution on the part of an experienced trafficker in narcotics. Certainly his *modus operandi* suggested such experience. Nor was the jury bound to accept appellant's statement that the sales were without profit. Kalehinian testified that he had obtained the same quantities from his prior supplier at lower rates. Appellant's prior convictions were of course cogent evidence of a predisposition to commit the offenses charged. Appellant's last conviction was in 1946, five years before the offenses charged, but he does not appear to have strayed far from the trade. He was obtaining drugs illegally during the in-[fol. 219]tervening period and it was a permissible inference that he had not changed his ways. In this connection it may be noted that his second conviction was separated from the first by a gap of four years and that the fact that he continued to traffic in narcotics following his first conviction indicated a disposition to continue his trade despite detection and punishment.

Appellant contends that evidence of these prior convictions was improperly admitted since "It is elementary that

the convictions of a defendant may be received in evidence only if the defendant testifies in his own behalf or introduces evidence of good character." But, there are exceptions to this rule, 2 Wignore, Evidence §§ 300-373, and one of them is that such evidence is admissible to negative the defense of entrapment. The Supreme Court stated in *Sorrells v. United States*, *supra*, "The predisposition and criminal design of the defendant are relevant. * * * if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense."

Justice Roberts dissented in *Sorrells* and Justices Brandeis and Stone joined in his dissent. The theory of the dissenters was that it was the function of the court alone to determine the question of whether the court was being made "the instrument of wrong," due to fraudulent or improper conduct of law enforcement officers, and that the submission of the issue of entrapment with the other issues for a general verdict was in effect construing a penal statute "as containing an implicit condition that it shall not apply in the case of entrapment." This reasoning was supported by a further argument closely touching the case now before us. Justice Roberts commented on the fact [fol. 220] that it was common practice in criminal trials in which the defense claimed entrapment to permit the government in rebuttal to show "that the officer guilty of incitement of the crime had reasonable cause to believe the defendant was a person disposed to commit the offense," and he continued (at p. 458): "This procedure is approved by the opinion of the court. The proof received in rebuttal usually amounts to no more than that the defendant had a bad reputation, or that he had been previously convicted." All this was said to support the view of the dissenters that the crime as defined in the statute made no reference to entrapment, that such a question merely affected the purity of the judicial process which was matter for the court alone. But the argument was rejected, and it is thus clear, as thus stated by Justice Roberts, that it was the considered

position of the majority of the Court that a defendant's prior convictions were admissible to negative the defense. We have explicitly adopted this rule. *United States v. Sherman, supra*; *United States v. Johnson*, 2 Cir., 208 F. 2d 404, cert. denied 347 U. S. 928. See also *Carlton v. United States*, 9 Cir., 198 F. 2d 795.

It has been argued that these decisions are not applicable here, since they deal only with the introduction of such evidence in rebuttal, whereas in the case at bar the evidence of prior convictions was admitted as part of the government's case in chief. But to understand these decisions as making the admissibility of such evidence always depend upon whether the defendant had introduced evidence would emasculate the rule and work grave prejudice to the government in cases where defendant, as here, elected to go to the jury on the proofs adduced by the prosecution in its case in chief. Accordingly, we reject appellant's contention that no evidence of a predisposition to commit the crime and no proof of prior convictions may ever be introduced by the government except in rebuttal to affirmative evidence [fol. 221] of entrapment adduced by defendant. But we are not called upon to, nor do we, propound any broad general rule on the subject. We do not now hold that evidence of predisposition or prior convictions may be introduced by the prosecution whenever there is a possibility that entrapment will be invoked as a defense.

"This is one of those classes of cases where it is safer to prick out the contour of the rule empirically, by successive instances, than to attempt definitive generalizations." *In re All Star Feature Corp.*, 231 Fed. 251 (L. Hand, J.).

We now need go no further than to hold that proof of prior convictions is admissible as part of the prosecution's case in chief where it is clear, as in the case before us, that the defense will be invoked.

There can be no doubt that such was appellant's intention in the case at bar. On the first trial, he introduced no evidence but requested a charge on entrapment, relying on the testimony of Kalchinian. When his attorney was informed by the prosecutor that Kalchinian would not testify on the second trial, he demanded that the government call him again; evidently so that he could again rely on the de-

fense. He informed the court that he would do so, and devoted his entire opening statement to a denunciation of Kalchirjian, telling the court and jury that appellant had been entrapped. His cross-examination was of the same pattern, bringing out the facts relevant to entrapment.

Under these circumstances it was proper for the government to introduce evidence of the prior convictions.

Appellant further contends that, because of the passage of time between the prior convictions and the offenses charged, the evidence should have been excluded as unduly prejudicial. We disagree. While it is doubtless true that the more remote the prior convictions the less their probative force, we are not prepared to say that on this record the probative force of these prior convictions was out-[fol. 222] weighed by the possibility that they might prejudice the jury. Cf. *Enriquez v. United States*, 9 Cir., 188 F. 2d 313.

Appellant's only other contention is that the transfers proven were not "sales" within the meaning of the statute, since the evidence showed that appellant was sharing the narcotics without profit. This contention must fail, for: (1) the jury may have believed that appellant was making the transfers and disbelieved his reported statement that he was doing so without profit; and (2) the statute enjoins all sales, not merely sales for profit.

Affirmed.

[fol. 223] IN UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals,
and for the Second Circuit, held at the United States
Courthouse in the City of New York, on the 4th day of
February one thousand nine hundred and fifty-seven.

Present: Hon. Thomas W. Swan, Hon. Harold R.
Medina, Hon. Sterry R. Waterman, Circuit Judges.

UNITED STATES, Plaintiff-Appellee

v.

JOSEPH GEORGE SHERMAN, Defendant-Appellant

JUDGMENT—February 4, 1957.

Appeal from the United States District Court for the
Southern District of New York.

This cause came on to be heard on the transcript of
record from the United States District Court for the South-
ern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered,
adjudged, and decreed that the judgment of said District
Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 224] [File endorsement omitted]

[fol. 225]. Clerk's Certificate to foregoing transcript
omitted in printing.

[fol. 227] SUPREME COURT OF THE UNITED STATES

No. 811, October Term, 1956

[Title omitted]

ORDER ALLOWING CERTIORARI—April 22, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 796. Oral argument in each case will be limited to 45 minutes a side.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

MAR 4 1957

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. ~~811~~ 87

UNITED STATES OF AMERICA

—v.—

JOSEPH GEORGE SHERMAN

Petitioner

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

HENRY A. LOWENBERG

Attorney for Petitioner

Reasons for Granting the Writ	1
Statutes Involved	2
Facts	3

REASONS FOR GRANTING THE WRIT

I. The petitioner was entrapped by the Government and petitioner should have been acquitted and the indictment dismissed by virtue of such entrapment 15

II. The receipt into evidence of the convictions of the petitioner in 1942 and 1946 where the indictment here charged crimes in 1951, without the petitioner taking the witness stand or calling any witnesses, but resting at the conclusion of the Government's case was in violation of Article 5 of the Amendments to the Constitution of the United States 22

III. Even if this Honorable Court should hold that an accused's record of convictions may be admitted into evidence, without any defense being offered, it is urged that the convictions of the petitioner in 1942 and 1946 were too remote from the crimes charged in 1951 as to make those convictions admissible into evidence, with no evidence offered by the Government about the petitioner from 1946 to 1951 23

CONCLUSION—For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted 26

APPENDIX 27

AUTHORITIES CITED

PAGE

Cases:

Caldwell v. United States, 78 F. 2d 282	24
Enriquez v. United States, 188 F. 2d 313	25
Sorrells v. United States, 287 U. S. 435	18, 19
United States v. Sherman, 200 F. 2d 880	3, 16, 24
United States v. Becker, 62 F. 2d 1007	17

United States Constitution:

Article 5 of the Amendments to the United States Constitution	22
--	----

Statutes:

21 U. S. C.:

Section 173	2
Section 174	3

IN THE
Supreme Court of the United States

October Term, 1956

No. _____

UNITED STATES OF AMERICA

—v.—

JOSEPH GEORGE SHERMAN

Petitioner

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

The petitioner, defendant-appellant below prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered on February 4, 1957. The petitioner was sentenced to a term of ten years.

Reasons for Granting the Writ

1. Was the petitioner entrapped by the Government into making the sales of narcotics and should the petitioner have been acquitted and the indictment dismissed by virtue of such entrapment?

2. Was the receipt in evidence on the trial of the convictions of the petitioner for narcotics in 1942 and 1946 as a direct part of the Government's case, without the petitioner taking the witness stand, but resting at the end of the Government's case, and where in the instant indictment crimes are charged in 1951 a violation of the Fifth Amendment to the United States Constitution and a denial of due process of law and a denial of a fair trial to appellant?

3. Were the convictions of the petitioner for narcotics in 1942 and 1946 where the instant indictment charges crimes in 1951 too remote in time as to make evidence of those previous convictions inadmissible into evidence on the trial of this petitioner?

Statutes Involved

21 U. S. C.:

"Section 173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures—

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which

are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

Section 174. Same; penalty; evidence—* * *

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

• Facts

This was a retrial of this case. The first trial ended in a conviction which was reversed by the Court of Appeals, Second Circuit, 200 F. 2d 880.

The Government on the trial of the indictment called eight witnesses. CLIFFORD MELIKIAN, an employee of the Federal Bureau of Narcotics, who had testified as a Government's witness on the previous trial, RAYMOND C. RUDDEN, an employee of the Federal Bureau of Narcotics, who had testified as a Government's witness on the previous trial, JAMES C. HUNT, an employee of the Federal Bureau of Narcotics, who had testified as a Government's witness on the previous trial, GEORGE J. ROMIG, JR., chief chemist in the Treasury Department laboratory in New York City, CHARLES KALCHINIAN, who testified as a Government's witness on the previous trial, MICHAEL J. REYNOLDS, narcotic agent, United States Treasury Department, CECIL E. NICKELL, narcotic agent, United States Bureau of Narcotics and ANTHONY J. DRAGO, Special investigator and chief of the identification unit of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, United States Treasury Department.

The appellant did not testify and did not call any witnesses, but rested at the end of the Government's case.

CLIFFORD MELIKIAN testified that he is a narcotic agent and that on November 1, 1951, he met agent Hunt and special employee Kalchinian in the vicinity of 46th Street and Eighth Avenue. Kalchinian, the informer, got into their car and agent Hunt searched him, found no narcotics and gave him \$15.00. They then drove to 24th Street and Eighth Avenue where Kalchinian got out of the car and he and agent Hunt followed (p. 12). They observed the appellant meet Kalchinian. He observed appellant hand something to Kalchinian and Kalchinian hand something to appellant. Kalchinian returned to the

Government's car and Kalehinian gave to him a glassine envelope containing a white substance. He, agent Hunt and Kalehinian initialed the glassine envelope (p. 13). On November 7, 1951, he and agents Hunt and Coyle met Kalehinian. Kalehinian got into the Government's car and Hunt searched Kalehinian and found no narcotics and he gave Kalehinian \$15.00. Kalehinian then got out of the car, met appellant, with him and agent Hunt following. He observed appellant hand something to Kalehinian and Kalehinian hand something to appellant (p. 14). Agent Hunt and he followed appellant, and then went back and met agent Coyle and Kalehinian. Agent Coyle gave him a Pall Mall cigarette package in which was a glassine envelope with a white substance and all then initialed the package. On November 16, 1951, he and agent Rudden met Kalehinian. He copied the serial numbers of a \$10.00 bill and a \$5.00 bill on a piece of paper. Agent Rudden searched Kalehinian, found no narcotics, and he gave Kalehinian \$15.00 (p. 15). This was the same money that he had noted the numbers of. He observed appellant meet Kalehinian, appellant hand something to Kalehinian and Kalehinian hand something to appellant. He followed appellant to 264 West 5th Street where he was joined by agent Rudden. They were admitted to the house by the appellant, where appellant was arrested. He found the \$10.00 bill and \$5.00 bill, which serial numbers had been noted by him, on the person of appellant (p. 16). The paper on which were written the serial numbers of the bills and the bills were received in evidence (pp. 17 and 18). The package which he received from Kalehinian on November 1, he weighed and conducted a field test of its contents which resulted in a positive reaction. He then

placed the contents in a lock, sealed envelope and delivered to the Government laboratory (pp. 18-19). With respect to activities on November 7, 1951, he retained custody of the package, tested and weighed it (p. 23). Following the arrest of the appellant on November 16, 1951, agent Ruden gave him a glassine envelope, on which he placed his initials and weighed the contents and placed it in a lock sealed envelope (p. 24).

On cross examination, he testified that he first met Kalchinian, the informer, in the summer of 1951, at which time Kalchinian was under arrest on a narcotic charge (p. 26). The United States Attorney requested of the Court a suspended sentence for Kalchinian on the narcotic charge (p. 27). He was not present at any conversation between Kalchinian and appellant (p. 28). He does not know if Kalchinian would induce anyone to sell him narcotics. Appellant told him at the time of the arrest that he was operating a rooming house at 264 West 17th Street, and he did not find out anything to the contrary (p. 29). He supposed appellant's income was derived from the rooming house (p. 29). No narcotics were found in appellant's premises although a search was conducted (p. 30). Kalchinian met appellant in the office of Doctor Grossman (p. 31). He did not know that appellant was at the doctor's office for a cure. He did not remember his testimony at the previous trial that the appellant told him that he was at Dr. Grossman's office for a cure for narcotic addiction (p. 31). Dr. Grossman has the practice of attempting to cure narcotic addicts (p. 32). He was not interested as to how the buy was to be made by Kalchinian as long as the buy was made (p. 33).

RAYMOND C. RUDDEN, testified that he is an agent of the Bureau of Narcotics (p. 34). On November 16, 1951, he met agent Melikian and Melikian noted two bills, a \$10.00 bill and a \$5.00 bill. They then met Kalchinian and he searched Kalchinian, found no narcotics. Kalchinian then left the Government's car, met the appellant, and the appellant handed something to Kalchinian (p. 35). Kalchinian then joined this witness and agent Melikian. They entered a Government car and Kalchinian handed him a Chesterfield cigarette package which contained a glassine envelope of white powder. He followed agent Melikian into 264 West 17th Street. Agent Melikian placed appellant under arrest there and from a number of bills taken from appellant were the two bills previously noted by agent Melikian (p. 36). He searched the room in which appellant and Melikian were standing. He turned the package given to him by Kalchinian over to agent Melikian (p. 37).

On cross examination, he testified that he had not met Kalchinian prior to this November 16 (p. 38). He did not find any narcotics in appellant's premises (p. 38). Appellant told him he collected rents for the building (p. 38). He was not interested in finding out how many times Kalchinian spoke to appellant about narcotics (p. 38). He did not check to see whether Kalchinian induced appellant to give him narcotics, nor did he investigate to find out if the appellant was entrapped on this narcotic charge (p. 39). He did not have a search warrant when he searched appellant and appellant did not object when he searched appellant's premises (p. 40).

JAMES C. HUNT testified that he has been a narcotic agent since August 15, 1951. On November 1, 1951, he and

agent Melikian met the informer. He searched the informer, found no narcotics or money on him, and agent Melikian gave the informer \$15.00. The informer got out of the car, and he saw the informer meet the appellant. He saw the appellant hand something to the informer and the informer hand something to the appellant. The informer then returned to the Government car where he searched the informer, found no money on him. The informer gave a Pall Mall cigarette package containing a white powder to agent Melikian. He and agent Melikian affixed their initials and date to contents of glassine envelope and Pall Mall package (pp. 41-42). On November 7, 1951, he and agents Coyle and Melikian met the Government informer. He searched the informer, found no narcotics on him, and agent Melikian gave the informer \$15.00. The informer met the appellant and he saw the informer hand something to the appellant and the appellant hand something to the informer (p. 43). He and agent Melikian followed the appellant, and they then returned to the Government car, at which time agent Coyle had a white powder contained in a glassine envelope, which the informer said he had purchased from appellant. The agents affixed their initials and date to the package (p. 44).

On cross examination, he testified that he knew nothing about the informer. The informer was attached to agent Melikian. He never suggested to agent Melikian to check on the informer, to find out what kind of person he is, or whether he is reliable or not (p. 45). He did not know how the informer met the appellant (p. 46).

GEORGE W. ROMIG, JR., called then as a witness for the Government testified that he is the chief chemist in the

Treasury Department laboratory in New York City. He identified a record from his laboratory, Government's Exhibit 2-B for identification which was received in evidence. He also identified Government's Exhibit 3-B as a record from his laboratory which was received in evidence. He also identified Government's Exhibit 4-B as a record of the laboratory maintained by it in the regular course of business (pp. 57-60). He did not know of the accuracy of the "Remarks." Part of the information was furnished by somebody else in the reports. The lower half of the reports is his report (p. 60). The top part of the aforementioned exhibits were typed in by the narcotic agent (p. 62). The records come in with the narcotics and the narcotics are then analyzed and he fills in the bottom of the record. He has no personal knowledge of the contents of the top part of the aforementioned records (pp. 62-63). Exhibits 2B-3B and 4B were received in evidence over appellant's objection and exception (p. 64). The Bureau of Narcotics submits a form to his office requesting the return of the narcotics and once a month narcotic agents come to his office and pick up the narcotics based on this form and he gets a receipt (p. 64). He then identified Government Exhibit 5 as one of the records which he gets after he gets a receipt for narcotics returned to the Narcotic Bureau. The receipt appears on this record. Exhibit 5 was received in evidence over appellant's objection and exception (pp. 63-64).

The next witness called by the Government was CHARLES KALCHINIAN. He testified that he had been convicted of the crime of the sale of narcotics. Following his arrest for narcotics by a Federal agent he performed services for the Bureau of Narcotics. At the time of his arrest he was

addicted to the use of narcotics (pp. 66-67). He first met appellant in a doctor's office where he had gone for a cure of narcotic addiction. He saw appellant in the doctor's office half dozen times. He used to go to a pharmacy to have prescriptions filled and saw appellant also there. He asked appellant about his experiences and appellant asked him about his experiences. He asked appellant if he had been getting drugs, and what quality. He asked appellant if there was a reliable man he could meet and appellant said he knew some people. He asked appellant if he could meet these people and appellant said nothing. He spoke to appellant again on the subject and appellant said "No". He told appellant he was not responding to treatment and needed something to sustain himself (pp. 68-69). Appellant said he might be able to get it. He later again asked appellant and appellant said he was working on it. He asked appellant how he could contact him. Appellant asked him where he could be contacted and he gave appellant his telephone number (p. 70). They agreed at all times to meet at the corner of 20th Street and Eighth Avenue. Appellant telephoned him about the first part of September and appellant delivered narcotics to him. Appellant telephoned him three or four times a week, but meetings were not always arranged. He decided to report these activities to Federal Bureau of Narcotics toward the end of October (p. 71). He saw agent Melikian (p. 72). He also spoke to a Mr. Levine of the Narcotic Bureau (p. 73). Appellant telephoned him after his visit to Narcotic Bureau. He called agent Melikian and told him that he was to make a purchase. That was on November 1, and he then met agents Hunt and Melikian. He was searched by agent Hunt and Melikian gave him \$15.00. He then met appellant, appellant

gave him a package and he gave appellant \$15.00. He then met agent Hunt, and he gave to agent Hunt the package (pp. 74-75). The next time he informed the agents of a pending transaction with appellant was on November 7th. Appellant had called him. An appointment was made. He met agents Hunt, Coyle and Melikian. He was searched by Hunt and Melikian gave him \$15.00. He then met appellant and appellant gave him a package and he gave appellant the \$15.00. He then returned to the Government car where he was searched by agent Hunt (pp. 76-77). He arranged another purchase from appellant which he did not report (p. 78). On November 16th, he received a call from appellant which he reported to agent Melikian. He made an appointment to meet appellant. He met agents Rudden and Melikian. He was searched by Rudden and Melikian gave him \$15.00. He then met appellant. Appellant gave him a package and he gave appellant the money (p. 78). He then returned to the Government car, and was searched by agent Rudden. He handed the package to agent Rudden and the package was initialed. He had made other purchases from appellant on his own account which he did not report (pp. 78-79). Prior to dealing with appellant, he made purchases elsewhere at a lower price (p. 80).

On cross examination, he testified he has now entered the field of photography and is living in Pasadena, California (p. 81). The punctures in his arm are from a narcotic needle of 15 years ago (p. 82). He has also used the names of James Ballow and Charles Gleason. At the time of his arrest and conviction for the sale of narcotics, he was a night clerk and manager of a hotel (p. 84). He would spend, during that period, thirty or forty dollars a week for narcotics while his salary was sixty, sixty-five dollars

a week. He did not live at the hotel. He denied ever committing a theft (p. 85). To live he borrowed money. This was all a year or two before these incidents. He pleaded guilty to the sale of narcotics (p. 86). He had thirty-five dollars a week to live on, to pay his rent, clothes and food and still paid back loans he had made. On his arrest for sale of narcotics to which he pleaded guilty, he was released on his own recognizance, without bail (p. 88). On the day of sentence, the United States Attorney told the Judge that he had cooperated and been useful to the Government. He did not want to go to jail (p. 89). He helped the Government in at least three cases (p. 90). He was at Dr. Grossman's office for a cure and appellant told him that he also was there for a cure. He saw appellant in Dr. Grossman's office (p. 90). He saw appellant in the doctor's office from time to time and the doctor has been treating addicts. He met appellant in the doctor's office by accident. Sometimes their appointments at the doctor's office happened to be at the same time. After seeing appellant in doctor's office two or three times, he said "hello" to appellant. Outside of the doctor's office, they discussed narcotics. He broached the subject two or three times to appellant about getting narcotics. The appellant just listened (p. 93). Knowing that appellant was at the doctor's office for a cure of narcotic addiction, he spoke to appellant about narcotics (p. 94). He approached appellant two or three times to supply narcotics (p. 96). He told agents, during the previous trial, that he thought we were getting along all right (p. 97). He had promised to cooperate before his sentence (p. 99). It was his job, while working with the agents, to go out and try to induce a person to sell narcotics to him (p. 100). He did not know how to

answer the question whether he would be prepared to send an innocent man up to help himself (p. 101). Appellant told him that he was a handyman. On the previous trial, he testified that appellant told him he was giving him half the narcotics he had bought. The appellant said he had paid \$25.00 and that he would have to give appellant \$15.00. The appellant told him he had taxi expenses (p. 108). On the previous trial, he testified that he and appellant were taking a withdrawal treatment by Dr. Grossman (p. 110). On previous trial, he testified that when he broached the subject of narcotics to appellant, appellant just listened (p. 112). The second time, they both talked on the subject (p. 113). The Bureau of Narcotics made suggestions to him as to how to approach appellant (p. 115). In addition, to appellant telling him that he, appellant, was at the doctor's office for a cure, he knew that appellant was going to same pharmacy as he to have his prescriptions filled (p. 124). On redirect examination, he testified that he would not frame an innocent man (p. 125).

MICHAEL J. REYNOLDS testified that he is a narcotic agent. He prepared a schedule of drugs received, confiscated and surrendered to Drug Disposal Committee. He was shown Government Exhibit 6 and it was such schedule (p. 127). He was shown Government Exhibit 7 and identified that as the Government bill of lading showing a shipment to Drug Disposal Committee of Bureau of Narcotics (pp. 128-129).

CECIL E. NICKELL testified that he is a narcotic agent and is a member of Drug Disposal Committee assigned to Washington, D. C. (p. 130). He identified Government Exhibit 8 as a record of drug shipments. The receipt of ship-

ment in Government Exhibit 7 is shown on Exhibit 8 (p. 131). He identified Government Exhibit 9 as a schedule of drugs shipped to Drug Disposal Committee which schedule is on the inside of the box of drugs (p. 132). It is the same as shown in Government Exhibit 8 (p. 133). He could not testify that any substance delivered to him was a narcotic drug (p. 134).

The Government then offered into evidence, over objection by appellant and motion made by appellant for a mistrial, Exhibits 10 and 11. Exhibits 10 and 11 are the files of the Court, numbers C112-103, C124-58, showing that appellant had been convicted twice before of narcotics (pp. 136-137-138).

CLIFFORD MELIKIAN, then recalled by the Government testified that following the arrest of the appellant, he took appellant to the Bureau of Narcotics where appellant was fingerprinted and photographed (p. 139). The fingerprint cards are submitted to the identification branch of Federal Bureau of Investigation. He identified Exhibit 12 as information he received from the FBI as a result of these prints about the appellant (p. 139). There was then a long colloquy between the trial court, assistant United States Attorney and counsel for appellant as to Exhibit 12, a report received from FBI (pp. 139 to 148). The Court received in evidence record of convictions of a man named Sherman for 1942 and 1946 (p. 146).

CLIFFORD MELIKIAN, over constant objection of appellant, continued to testify that it is the custom of Bureau of Narcotics to place an index number on each case. That number goes on fingerprint charts (p. 150). He then identified Form 121, which is a record kept by the Federal Bureau of

Narcotics which gives the name of defendant, date of conviction and disposition by the Judge and which contains the docket number of the Federal Court (p. 153). The Court received all records pertaining to previous convictions of appellant for narcotics over appellant's objections (pp. 154 to 174).

The appellant rested at the end of the Government's case. The appellant did not take the witness stand nor did he offer any evidence.

REASONS FOR GRANTING THE WRIT

I.

The petitioner was entrapped by the Government and petitioner should have been acquitted and the indictment dismissed by virtue of such entrapment.

It cannot be disputed that the appellant and the special informer for the Government, Charles Kalchinian met in a doctor's office where the appellant went for a cure from narcotic addiction. The special employee for the Government approached appellant about narcotics two or three times, even telling appellant that he was not responding to treatment. The appellant finally weakened. They had met in the doctor's office half dozen times and went together to the pharmacy to have their prescriptions filled. The narcotics appellant obtained at the instigation of Government informer were divided between appellant and this informer. The appellant paid twenty-five dollars for narcotics and the special employee gave appellant fifteen dollars which included cab fare. The special employee was under criminal charges for dealing in narcotics when he

made these purchases. He was used as a decoy to make a case against the appellant. So here we have a situation where the appellant is at a physician's office to rehabilitate himself, to cure himself of narcotic addiction, and to get himself away entirely from any dealings with narcotics whatsoever, and there he is approached by a special employee of the Bureau of Narcotics. There is no evidence that the appellant was engaged in the traffic of narcotics at that time.

This was a retrial of this indictment. The previous trial ended in a judgment of conviction and a reversal of the judgment of conviction, *United States v. Sherman*, 200 F. 2d 880.

On this retrial of this indictment, the Government produced the same witnesses, only with the exception that proof was produced by the Government that the narcotics were destroyed and proof of the appellant's prior convictions for narcotics as a direct part of the Government's case, without the appellant taking the witness stand or offering any proof, but resting his case at the end of the Government's case.

On this same evidence, the Court, in reversing the previous conviction of this appellant, on this indictment held that this appellant was entrapped by the Government into committing this crime, *United States v. Sherman*, 200 F. 2d 880. The Court at pages 882-883 of this case said:

"Therefore in such cases two questions of fact arise: (1) did the agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persua-

sion and was he awaiting any propitious opportunity to commit the offense. On the first question the accused has the burden; on the second the prosecution has it. In the case at bar plainly Kalchinian did induce the first sale, but that was irrelevant, unless at that time the two had made the agreement described above. If they did, it would be true that the later sales resulted from Kalchinian's original inducement for it meant that he was in the market, so to say, and might buy whenever Sherman had any heroin to offer. *Although, as we have said, on that issue Sherman had the affirmative the evidence to support the defense was ample, if indeed not conclusive. On the other hand since the prosecution had the burden upon the issue of the excuse for inducement, it had to satisfy the Jury that Sherman did not need any persuasion; but that he stood ready to procure heroin for anyone who asked for it; and the evidence scarcely supported such a finding. So far as appeared, Sherman shared his heroin with Kalchinian as a fellow addict, and without profit. That was no evidence that he was in the habit of dispensing heroin, any more than his habit of buying it illicitly for himself or than the furtive way in which he wrapped up the heroin. We need not however decide that the refusal to direct a verdict required a dismissal of the indictment, because there must be a reversal anyway, and upon a new trial there may be other evidence of Sherman's dealings in narcotics.*

In the case of *United States v. Becker*, 62 F. 2d 1007, Judge Hand in holding that the defendant was not entrapped, stated at page 1008:

"The precise limits were left open as to what would excuse such instigation. The only excuses

that Courts have suggested so far as we can find, are these: an existing course of similar criminal conduct; the accused's already formed design to commit the crime or similar crimes; his willingness to do so, as evinced by ready complaisance."

The Court further stated, at page 1008:

"However, it has been uniformly held that when the accused is continuously engaged in the proscribed conduct, it is permissible to provoke him to a particular violation which will be no more than an instance in a uniform series."

There is no evidence in this case that the appellant was dealing in narcotics at the time of this indictment. The two previous convictions of appellant, which were received in evidence as a part of the Government's case, over objection by appellant and denial of a mistrial, were in 1942 and 1946 while the indictment here charged a violation of the narcotic law in the year 1951. There was no evidence offered by the Government to show that the appellant was engaged in sales of narcotics from the date of his last conviction in 1946 to the dates of the crimes charged in this indictment, which were in the year 1951. In other words, there was no proof at all offered by the Government as to the appellant from 1946 to 1951, a lapse of five years. There therefore was no evidence that appellant was continuously engaged in the traffic. As a matter of fact, Kalchinian, the Government's witness, testified that the appellant was a handyman.

The leading case on the law of entrapment is *Sorrells v. United States*, 287 U. S. 435 (1932). In that case, a prohibition agent went to the defendant's home, accompanied

by three residents who knew the defendant well. The agent asked the defendant if he could get him some liquor. Defendant stated that he did not have any. The agent made a second request without result. On the third request, defendant left his home and after a few minutes came back with a half gallon of liquor. The agent testified that he was the first and only person among those present at the time who said anything about securing liquor, and that his purpose was to prosecute the defendant for procuring and selling it. To support this testimony, the Government called three witnesses who testified that the defendant had the general reputation of rum runner. There was no evidence, however, that the defendant had ever possessed or sold any intoxicating liquor prior to the transaction in question.

The Court held that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the agent, that it was the creature of his purpose, and that the defendant had no previous disposition to commit it, also that the agent lured the defendant, otherwise innocent, to its commission by repeated and persistent solicitation (p. 441).

The facts in this instant case can be favorably compared to the facts in case of *Sorrells v. United States*, 287 U. S. 435, above cited. In the case at bar, Kalchinian, the informer for the Government, instigated the crimes here by soliciting appellant two or three times to obtain narcotics, to be divided between them. He instigated the crimes here knowing full well that appellant was being treated by a physician for narcotic addiction, having met appellant in the doctor's office. The evidence here shows that the crimes

here were the creature of Kalchirian and that he lured appellant, otherwise innocent, into obtaining narcotics for him and appellant, to be divided between them.

So here we have a situation where the appellant is at a physician's office to rehabilitate himself, to cure himself of narcotic addiction, and to get away entirely from any dealings with narcotics whatsoever, and there he is approached by a special employee of the Bureau of Narcotics. To condone such a practice would merely mean that any addict who wishes to rehabilitate himself and to cure himself of narcotic addiction could be made the subject of a party to a sale and thereby destroy any hope for that individual's attempt to rehabilitate himself and cure himself. For this Court to condone this conduct will merely mean that any addict would not even be safe in a doctor's office for fear that he might be approached by an informer for the Government and induced to participate in a division of narcotics between them.

In affirming the judgment of conviction on February 4, 1957 of this petitioner, the United States Court of Appeals in part said:

"On that appeal we set aside appellant's conviction because of error in the charge. This error was corrected on the second trial and the evidence was sufficient to warrant a finding that the accused was ready and willing to commit the offense charged, whenever the opportunity offered. The jury was justified in regarding appellant's hesitancy as no more than prudent caution on the part of an experienced trafficker in narcotics. Certainly his *modus operandi* suggested such experience. Nor was the jury bound to accept appellant's statement that the

sales were without profit. Kalchinian testified that he had obtained the same quantities from his prior supplier at lower rates. Appellant's prior convictions were of course cogent evidence of a predisposition to commit the offenses charged. Appellant's last conviction was in 1946, five years before the offenses charged, but he does not appear to have strayed far from the trade. He was obtaining drugs illegally during the intervening period and it was a permissible inference that he had ~~not~~ changed his ways. In this connection it may be noted that his second conviction was separated from the first by a gap of four years and that the fact that he continued to traffic in narcotics following his first conviction indicated a disposition to continue his trade despite detection and punishment."

There was not a word of evidence as to the petitioner from 1946 to 1951, when in the year 1951 the petitioner was in the office of a doctor for a cure for addiction to narcotics where by chance he met the informer for the Government who was also there for a cure. When the petitioner became addicted to the use of narcotics is an open question. The Government offered no evidence of that. It may have been a month or two months before the petitioner visited the doctor. Yet the Court of Appeals drew an inference not predicated on any facts in evidence.

II.

The receipt into evidence of the convictions of the petitioner in 1942 and 1946 where the indictment here charged crimes in 1951, without the petitioner taking the witness stand or calling any witnesses, but resting at the conclusion of the Government's case was in violation of Article 5 of the Amendments to the Constitution of the United States.

Article 5 provides:

"No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." (Italics ours.)

: There was no evidence offered by the Government at the trial as to the petitioner from 1946 to 1951. Surely a lapse of five years without any evidence cannot show a predisposition on the part of the petitioner to commit a crime or show any criminal intent. Surely it is not to be said that because one has committed a crime several years before his indictment on another crime, that with that lapse of years, a defendant had a continuing predisposition to commit a crime or crimes and had a continuing criminal intent. If that were the case, then anyone who had ever been convicted of a crime would have no chance to readjust himself.

It is therefore urged that the receipt into evidence of the previous convictions of petitioner as a part of Government's direct case, in 1942 and 1946, without petitioner testifying, but resting at the end of Government's case, surely was compelling the petitioner to be a witness against himself in violation of Article 5 of the Amendments to the United States Constitution. It was also a denial of due process of law and a denial of a fair trial. It is submitted that the office of the United States Attorney surely cannot take issue with the fact that the receipt into evidence of the petitioner's two convictions in 1942 and 1946 must have had a marked effect on the Jury.

III.

Even if this Honorable Court should hold that an accused's record of convictions may be admitted into evidence, without any defense being offered, it is urged that the convictions of the petitioner in 1942 and 1946 were too remote from the crimes charged in 1951 as to make those convictions admissible into evidence, with no evidence offered by the Government about the petitioner from 1946 to 1951.

The Government showed nothing about the appellant from the date of his last conviction in 1946 and crimes here now charged in 1951. There was a lapse of five years with no evidence about the appellant. The fact that the appellant was convicted in 1942 and 1946 for narcotics, that in itself, would not show that the appellant was in the habit of dispensing heroin even on those dates. Surely with a period of five years intervening between the conviction of appellant in 1946 and this crime of 1951, with no

evidence about the appellant during this five year period, surely could not show that he was engaged in dispensing heroin, during five years after the last conviction. With no evidence about the appellant during this period, surely a lapse of five years from the date of the last conviction would be too remote. In fact, when the Court used the expression in the opinion in *United States v. Sherman, supra*, "that was no evidence that he was in the habit of dispensing heroin, any more than his habit of buying it illicitly for himself or than the furtive way in which he wrapped up the heroin," the Court could only have meant about the time of the crimes in 1951 charged herein, and not related to appellant's past conviction in 1946.

With respect to the Government's contention that appellant's convictions in 1942 and 1946 would show a criminal intent, that cannot be even considered worthy but is utterly ridiculous. How can a conviction in 1946 show that the individual had a criminal intent five years later to commit a crime. Where is the line to be drawn? Is this Court prepared to say that a man convicted in 1946 and charged with having committed a crime in 1951, that that lapse of five years would show a criminal intent, but if it were six years, it would show no criminal intent? No evidence was introduced or offered by the Government about appellant during that five year period.

In *Caldwell v. United States*, 78 F. 2d 282, at the time of the trial the defendant was twenty-six years of age and one of the Government's witnesses was permitted over the objection of the defendant's counsel to testify that an investigation disclosed that the defendant had been sentenced in a Federal Court, about the year 1925, for viola-

tion of the National Prohibition Act. This prior conviction of the defendant happened ten years before the trial. The Court in that case held that while it is well settled that evidence of similar transactions may be admissible, under certain circumstances, as bearing upon the question of intent, purpose, design, or knowledge, the transaction, the testimony as to which was here permitted to be presented to the jury, was entirely too remote and the evidence was not admissible (p. 283).

In offering the previous convictions of appellant, without appellant taking the witness stand and not offering any evidence of good character but resting on the Government's case, the Government relied also on the case of *Enriquez v. United States*, 188 F.2d 313. In that case the defendant and five others were charged with the sale of narcotics and conspiracy. In that case, the Court said:

"The effort to capitalize on the alleged error in admitting this record is beset with serious procedural difficulties. At a later stage of the trial appellant took the witness stand and testified generally and at length in his own defense. This being so, his prior conviction might have been proved in due course either by cross examination or by production of the record, so that the fact and nature of the conviction would presumably have been gotten before the jury in any event" (p. 316).

In this case, appellant rested on the Government's case, without testifying or introducing any evidence of good character. Therefore the case of *Enriquez v. United States*, *supra*, relied on by the Government at the trial does not apply.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY A. LOWENBERG

Attorney for Petitioner

APPENDIX

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

No. 172—October Term, 1956.

(Argued December 10, 1956 Decided February 4, 1957.)

Docket No. 24342

UNITED STATES OF AMERICA,

Appellee,

JOSEPH GEORGE SHERMAN,

Appellant.

Before:

SWAN, MEDINA and WATERMAN,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Thomas F. Murphy, *Judge*.

Defendant appeals from a judgment of conviction of selling narcotics in violation of 21 U. S. C. Section 174. Affirmed.

Appendix

PAUL W. WILLIAMS, United States Attorney for the Southern District of New York, New York City (Malcolm Monroe and Maurice N. Nessen, Assistant United States Attorneys, New York City, of Counsel), *for appellee.*

HENRY A. LOWENBERG, New York City, *for appellant.*

MEDINA, Circuit Judge:

This appeal is from a judgment of conviction under an indictment charging sales of narcotics on three occasions in violation of 21 U. S. C. Section 174. The evidence established the following facts: appellant and one Kalchinian, both addicted to the use of narcotics, became acquainted as a result of meeting several times in the office of the physician whom they were consulting in an effort to cure their addiction and in the pharmacy to which they took their prescriptions to be filled. After several casual greetings, they began to discuss their experiences in the use of narcotics. In response to a question, appellant told Kalchinian that he was then purchasing drugs. Kalchinian, who was not responding well to treatment, informed appellant of this fact and requested an introduction to appellant's supplier. After two or three such requests, appellant stated that the man was going out of business and for this reason he could not introduce appellant to him. Upon Kalchinian's asking, "How can I then?" appellant said he might be able to get some drugs for him. To a subsequent inquiry appel-

Appendix

lant replied that he was working on it. Kalchinian asked how he could get in touch with appellant, but appellant suggested instead the following procedure. If and when he had drugs for Kalchinian he would telephone him and tell him what time to meet him. Appellant took Kalchinian's telephone number and designated a certain street corner as the meeting place. He said that he expected to purchase heroin at \$25 for 1/16 ounce and that he would let Kalchinian have half that amount for \$15, explaining that the additional \$2.50 was for his cab fare and trouble. Kalchinian agreed to these arrangements, and several transfers took place. Later Kalchinian, who was awaiting sentence on a narcotic charge to which he had pleaded guilty and who had previously worked with the Federal Bureau of Narcotics on two cases, for the first time informed the Bureau of his dealings with appellant.

On the three dates charged in the indictment, agents observed Kalchinian exchange \$15 for a small quantity of heroin contained in a glassine envelope concealed in an empty cigarette package. The government also proved, over appellant's objection, that he had twice before been convicted on narcotic charges: in 1942 for selling opium and in 1946 of possession of 720 grains of morphine in 5-grain capsules, 261 grains of heroin in six cellophane bags, and two ounces of opium in three jars.

• The principal issues on this appeal revolve about the defense of entrapment. The Supreme Court has held "the controlling question" under this defense to be "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own

officials." *Sorrells v. United States*, 287 U. S. 435, 451. Thus, if it be shown without more that the defendant was induced by government agents to engage in the proscribed activity, no conviction may be had. *United States v. Masciale*, 2 Cir., 236 F. 2d 601; *United States v. Sherman*, 2 Cir., 200 F. 2d 880. But "the defense of entrapment is not simply that the particular act was committed at the instance of government officials. That is often the case where the proper action of these officials leads to the revelation of criminal enterprises." *Sorrells v. United States*, *supra*. "There is no entrapment when a purchase is made at the instance of the law officers where the seller is ready and willing, without persuasion and awaiting any propitious opportunity, to commit the offense." *United States v. White*, 2 Cir., 223 F. 2d 674.

On a prior appeal in the case at bar, *United States v. Sherman*, *supra*, Judge Learned Hand stated, page 882:

"As we understand the doctrine it comes to this: that it is a valid reply to the defence, if the prosecution can satisfy the jury that the accused was ready and willing to commit the offence charged, whenever the opportunity offered. In that event the inducement which brought about the actual offence was no more than one instance of the kind of conduct in which the accused was prepared to engage; and the prosecution has not seduced an innocent person, but has only provided the means for the accused to realize his pre-existing purpose. The proof of this may be by evidence of his past offences, of his preparation, even of his 'ready complaisance.' Obviously, it is not necessary that the past offences proved shall be precisely the same as that charged, provided they are

Appendix

near enough in kind to support an inference that his purpose included offences of the sort charged."

On that appeal we set aside appellant's conviction because of error in the charge. This error was corrected on the second trial and the evidence was sufficient to warrant a finding "that the accused was ready and willing to commit the offence charged, whenever the opportunity offered." The jury was justified in regarding appellant's hesitancy as no more than prudent caution on the part of an experienced trafficker in narcotics. Certainly his *modus operandi* suggested such experience. Nor was the jury bound to accept appellant's statement that the sales were without profit. Kalehonian testified that he had obtained the same quantities from his prior supplier at lower rates. Appellant's prior convictions were of course cogent evidence of a predisposition to commit the offenses charged. Appellant's last conviction was in 1946, five years before the offenses charged, but he does not appear to have strayed far from the trade. He was obtaining drugs illegally during the intervening period and it was a permissible inference that he had not changed his ways. In this connection it may be noted that his second conviction was separated from the first by a gap of four years and that the fact that he continued to traffic in narcotics following his first conviction indicated a disposition to continue his trade despite detection and punishment.

Appellant contends that evidence of these prior convictions was improperly admitted since "It is elementary that the convictions of a defendant may be received in evidence only if the defendant testifies in his own behalf or intro-

duces evidence of good character." But, there are exceptions to this rule, 2 Wigmore, Evidence §§300-373, and one of them is that such evidence is admissible to negative the defense of entrapment. The Supreme Court stated in *Sorrells v. United States, supra*, "The predisposition and criminal design of the defendant are relevant.* * * if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense."

Justice Roberts dissented in *Sorrells* and Justices Brandeis and Stone joined in his dissent. The theory of the dissenters was that it was the function of the court alone to determine the question of whether the court was being made "the instrument of wrong," due to fraudulent or improper conduct of law enforcement officers, and that the submission of the issue of entrapment with the other issues for a general verdict was in effect construing a penal statute "as containing an implicit condition that it shall not apply in the case of entrapment." This reasoning was supported by a further argument closely touching the case now before us. Justice Roberts commented on the fact that it was common practice in criminal trial in which the defense claimed entrapment to permit the government in rebuttal to show "that the officer guilty of incitement of the crime had reasonable cause to believe the defendant was a person disposed to commit the offense," and he continued (at p. 458): "This procedure is approved by the opinion

of the court. The proof received in rebuttal usually amounts to no more than that the defendant had a bad reputation, or that he had been previously convicted." All this was said to support the view of the dissenters that the crime as defined in the statute made no reference to entrapment, that such a question merely affected the purity of the judicial process which was matter for the court alone. But the argument was rejected, and it is thus clear, as thus stated by Justice Roberts, that it was the considered position of the majority of the Court that a defendant's prior convictions were admissible to negative the defense. We have explicitly adopted this rule: *United States v. Sherman*, *supra*; *United States v. Johnson*, 2 Cir., 208 F. 2d 404, cert. denied 347 U. S. 928. See also *Carlton v. United States*, 9 Cir., 198 F. 2d 795.

It has been argued that these decisions are not applicable here, since they deal only with the introduction of such evidence in rebuttal, whereas in the case at bar the evidence of prior convictions was admitted as part of the government's case in chief. But to understand these decisions as making the admissibility of such evidence always depend upon whether the defendant had introduced evidence would emasculate the rule and work grave prejudice to the government in cases where defendant, as here, elected to go to the jury on the proofs adduced by the prosecution in its case in chief. Accordingly, we reject appellant's contention that no evidence of a predisposition to commit the crime and no proof of prior convictions may ever be introduced by the government except in rebuttal to affirmative evidence of entrapment adduced by defendant. But we are not called upon to, nor do we, propound any broad general rule on

the subject. We do not now hold that evidence of predisposition or prior convictions may be introduced by the prosecution whenever there is a possibility that entrapment will be invoked as a defense.

"This is one of those classes of cases where it is safer to prick out the contour of the rule empirically, by successive instances, than to attempt definitive generalizations." *In re All Star Feature Corp.*, 231 Fed. 251 (L. Hand, J.).

We now need go no further than to hold that proof of prior convictions is admissible as part of the prosecution's case in chief where it is clear, as in the case before us, that the defense will be invoked.

There can be no doubt that such was appellant's intention in the case at bar. On the first trial, he introduced no evidence but requested a charge on entrapment, relying on the testimony of Kalchinian. When his attorney was informed by the prosecutor that Kalchinian would not testify on the second trial, he demanded that the government call him again, evidently so that he could again rely on the defense. He informed the court that he would do so, and devoted his entire opening statement to a denunciation of Kalchinian, telling the court and jury that appellant had been entrapped. His cross-examination was of the same pattern, bringing out the facts relevant to entrapment.

Under these circumstances it was proper for the government to introduce evidence of the prior convictions.

Appellant further contends that, because of the passages of time between the prior convictions and the offenses charged, the evidence should have been excluded as unduly prejudicial. We disagree. While it is doubtless true that the more remote the prior convictions the less their proba-

Appendix

tive force, we are not prepared to say that on this record the probative force of these prior convictions was outweighed by the possibility that they might prejudice the jury. Cf. *Enriquez v. United States*, 9 Cir., 188 F. 2d 313.

Appellant's only other contention is that the transfers proven were not "sales" within the meaning of the statute, since the evidence showed that appellant was sharing the narcotics without profit. This contention must fail, for: (1) the jury may have believed that appellant was making the transfers and disbelieved his reported statement that he was doing so without profit; and (2) the statute enjoins all sales, not merely sales for profit.

Affirmed.

No. ~~811~~ 87

IN THE
Supreme Court of the United States
OCTOBER TERM, ~~1956~~ 57

JOSEPH GEORGE SHERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition For a Writ of Certiorari to the
United States Court of Appeals for the
Second Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

WARREN OLNEY III,
Assistant Attorney General,

BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys,

Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	6
Conclusion	10

CITATIONS

Cases:

<i>Carlton v. United States</i> , 198 F. 2d 795.....	10
<i>Masciale v. United States</i> , No. 796, this Term.....	7
<i>Sorrells v. United States</i> , 287 U.S. 435.....	7, 8, 9
<i>United States v. Becker</i> , 62 F. 2d 1007.....	8
<i>United States v. Sherman</i> , 200 F. 2d 880.....	2, 8
<i>United States v. Valdes</i> , 229 F. 2d 145.....	10

IN THE
Supreme Court of the United States
OCTOBER TERM, 1956

No. 811

JOSEPH GEORGE SHERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition For a Writ of Certiorari to the
United States Court of Appeals for the
Second Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 203) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 4, 1957 (R. 210). The petition for a writ of certiorari was filed on March 4, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established the defense of entrapment.

2. Whether, where the defense indicated in the opening statement that it was relying on the defense of entrapment, the government could properly prove accused's two prior narcotics convictions as part of its direct case.

STATEMENT

The first trial of petitioner in the United States District Court for the Southern District of New York resulted in a conviction for three sales of heroin (three counts) in violation of 21 U.S.C. 173, 174, which was reversed by the Court of Appeals for the Second Circuit (*United States v. Sherman*, 200 F. 2d 880 (C.A. 2)) because of erroneous instructions on the defense of entrapment. At a second trial, petitioner was again convicted on all three offenses and this time his conviction was affirmed.

The evidence may be summarized as follows:

1. In May or June, 1951, Charles Kalchinian was arrested for illegally selling narcotics (R. 67). Thereafter, he agreed to, and did, serve as a special employee or agent of the Federal Bureau of Narcotics while at liberty on his own recognizance (R. 12, 67, 88, 89). During the latter part of August, 1951, Kalchinian happened to meet the defendant at a doctor's office where both were seeking treatment for narcotics addiction (R. 68, 90, 91). During their first encounter their discussion was limited to their mutual experiences, but subsequently Kalchinian,

after indicating a personal need for narcotics, asked the defendant if he (Sherman) had a reliable source that Kalchinian could meet (R. 69, 94). Defendant was non-committal regarding this inquiry (R. 92). On a later occasion he informed Kalchinian that his contact was going out of business and that Kalchinian therefore could not meet him. However, defendant suggested that he might be able to see to it that Kalchinian received narcotics (R. 69-70). On a later occasion Kalchinian again asked Sherman for narcotics and the petitioner replied that "he was working on it" (R. 70, 96). Petitioner never provided a means whereby Kalchinian could contact him, but did arrange to contact Kalchinian "whenever he was ready" (R. 70). Sometime during the first part of September, 1951, the petitioner delivered narcotics to Kalchinian, and thereafter would call Kalchinian some three or four times a week. These calls often resulted in a meeting at which petitioner would deliver narcotics to Kalchinian (R. 71). Toward the end of October, 1951, Kalchinian reported to the Federal Bureau of Narcotics that he had found a person from whom he could purchase drugs, and arrangements were made to make the "buys" which form the gist of the counts presently before this Court (R. 71, 73-74).

On November 1, 1951, Kalchinian informed Agent Clifford Melikian, of the Federal Bureau of Narcotics, that he intended to purchase narcotics from this defendant later that day (R. 12, 74). Agents Melikian and Hunt arranged a meeting with Kalchinian and at that time searched him to insure that he was

not then in possession of any narcotics. Kalchinian was then furnished with government funds with which to make the "buy" (R. 12, 74). Thereafter, Kalchinian met the defendant according to their arrangement and bought for \$15 a white substance enclosed in a small glassine envelope (R. 13, 75).

The procedure outlined above was repeated on November 7 and 16, 1951 (R. 14-16, 76-79). The defendant was arrested after the third purchase, and the money which had been given to Kalchinian on that day was found on defendant's person (R. 16). Upon subsequent laboratory analysis, the substance purchased in each instance turned out to be heroin. Prior to dealing with petitioner, Kalchinian had purchased similar quantities of narcotics from other sources at a lower price (R. 80-81).

2. Petitioner did not take the witness stand nor did he call any witnesses. Defense counsel's opening statement to the jury, however, consisted of an argument that the government's own witnesses would establish the defense of entrapment (Special Record, p. 328),¹ and his counsel cross-examined Kalchinian at great length to develop an issue of entrapment. On this basis the government, as part of its case in

¹ Petitioner's opening statement does not appear in the record presently on file with the Court. However, the Court of Appeals for the Second Circuit granted leave to amend and supplement the record by adding to it the transcript of the appellant's opening statement to the jury. Later, the Court of Appeals ordered that the complete original record be certified and transmitted and it is filed herewith. References to the original record will be indicated as Special Record, p. —. The references designated "R." are to the record filed by petitioner.

chief, showed that the accused had been convicted of selling opium in 1942 and of possessing narcotics in 1946 (R. 136-138, 180, 187; Special Record, Exhibits). The jury was properly instructed on this defense (R. 187-189).²

² In part, the instruction reads as follows:

"The defendant in addition to his plea of not guilty has offered testimony by way of cross examination which, if believed by you, would constitute the defense of entrapment.

"It is undoubtedly true that the creation by the Government employee of the opportunity or facility for the commission of a crime does not defeat the prosecution. Artifice and stratagem can be employed to catch those engaged in criminal enterprises. The appropriate object of this permitted activity is to reveal a criminal design, to expose illicit traffic and other offenses, and thus disclose would-be violators of the law.

"But when the criminal design originates with Government officials or employees and they implant in the mind of an innocent person the disposition to commit an alleged offense and induce its commission in order that they may prosecute, then in such an event a defendant cannot be found guilty but must be acquitted, and this is so because the defendant is entrapped into committing a crime, and that shocks public decency.

* * *

"And bear in mind that even if you believe that the defendant has been previously convicted of narcotics, the defendant may still have been induced and entrapped to commit the crime charged here. And if you find that to be so you must acquit the defendant despite his previous convictions.

"In short, on this issue of entrapment, if you believe that the defendant was induced by Kalchinian to commit the offenses charged in the indictment, you must acquit unless you find that the Government has sustained its burden of proving that the accused was ready and willing without persuasion, and was waiting for a propitious opportunity to commit the offense."

* * *

ARGUMENT

1. Petitioner's argument that the government's evidence established entrapment rests on the fact that Kalchinian, special employee of the government, first broached the subject of narcotics, and made several requests before his efforts met with success. But this does not compel the inference that petitioner was a person who was drawn into crime solely through the government's efforts. His caution was no more than that to be expected on the part of any experienced trafficker in habit-forming and forbidden drugs. Kalchinian was a complete stranger to petitioner prior to August, 1951, and no dealer in narcotics could hope to remain at liberty very long if he accepted new and unknown customers with no hesitancy whatsoever.

The conclusion that the petitioner was not an innocent person who was victimized by Kalchinian becomes most reasonable when it is considered he supplied narcotics regularly and frequently, and that Kalchinian paid a price for the narcotics which was somewhat higher than that charged by his earlier sources of supply. This evidence indicates that petitioner was acting for profit, and not out of any desire to help a suffering addict.

Petitioner had considerable experience with narcotics. As long ago as 1942, he must have known that there was money to be made in the drug traffic and how to procure a supply, for his first conviction, in that year, evidences that he was in that business. Clearly he did not regard his first conviction as too high a price to pay, for in 1946 he was convicted of possessing narcotics. This is strong evidence that

he had not changed his ways during the intervening period, nor subsequent thereto.³

Petitioner argues that, because he met Kalchinian at the office of a doctor who attempted to cure narcotics addiction, it must be inferred that petitioner was attempting to cure his own addiction and rehabilitate himself. It could as reasonably be inferred that the accused went to the doctor's office as a source of customers, and not to rehabilitate himself. The frequency of sales and the high price are inconsistent with a sincere attempt at rehabilitation.

The basic issue on entrapment is "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense, which is the product of the creative activity of its own officials." *Sorrells v. United States*, 287 U.S. 435, 451. It is not enough to make out the defense to show that the particular offense was committed at the instance of a government agent, *Sorrells v. United States*, *supra*, for if the evidence reveals "an existing course of similar criminal conduct; the accused's already formed design to commit the

³This case is distinguishable from *Masciale v. United States*, this Term, No. 796, in which this Court has granted a petition for a writ of certiorari. In that case there was only one sale; here, there were three extending over a period of several weeks. Here, it was shown that petitioner had two prior convictions for violating the narcotic laws; there, there was no evidence to that effect. Masciale testified that the government's informer, Kowel, asked Masciale to pose as a substantial narcotics dealer solely to impress Marshall, the government agent who posed as a buyer, and this testimony was not directly contradicted; here, the petitioner did not testify.

crime or similar crimes; [or] his willingness to do so, as evinced by ready complaisance", the inducement is excused. *United States v. Becker*, 62 F. 2d 1007, 1008 (C.A. 2). Here the evidence permitted the inference that the accused was ready and willing to commit the offense charged; and the government's inducement merely provided the means for petitioner to realize his preexisting purpose. The issue was therefore properly submitted to the jury for decision. *Sorrells v. United States*, 287 U.S. 435, 452. Its conclusion, affirmed by the Court of Appeals, presents no issue warranting further review by this Court.

2. Petitioner argues that it was error to introduce evidence of his prior convictions as part of the government's case in chief, since he did not take the stand. However, the entire opening statement of petitioner's counsel to the jury was devoted to expounding a theory of entrapment, and his counsel conducted a lengthy cross-examination of Kalchinian on that issue.

On this basis, petitioner's prior convictions became directly relevant to negative the defense of entrap-

¹ It is true that the Court of Appeals for the Second Circuit, in its opinion on appeal after the first trial of this case, suggested (200 F. 2d 880, 883) that the trial court would have been justified in directing a verdict for the defendant, on grounds of entrapment, at the close of the government's case. The government, however, offered additional evidence at the second trial. It proved that the accused had profited from his sales to Kalchinian, and that he had a long record of criminal activity in the field of narcotics. Whatever might have been the view of the Court of Appeals following the first trial, it clearly indicated its belief that the defense was not made out at the second. (R. 206).

ment and evidence of prior convictions was therefore proper. As this Court said in *Sorrells v. United States, supra*, 287 U.S. at 451-452, "if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense."

The previous convictions were not too remote to show criminal predisposition and design. Petitioner was sentenced to serve one year and six months for the offense in 1942 (R. 142). He was not sentenced for the 1946 crime until 1947, and on that occasion was placed on two years probation on condition that he enter the United States Public Health Hospital in Lexington, Kentucky, and stay there until cured of the drug habit. The judgment bears a certificate showing that accused did not enter the hospital until March 10, 1947 (Special Record, Exhibit 11). While incarcerated, the accused could not have engaged in the drug traffic as a regular business and these periods should be excluded in determining remoteness.

In any event, the mere lapse of time should go to the weight to be given to the previous convictions, not to their admissibility. It is true that the existence of a substantial time period between prior offenses and the present one permits the inference that accused may have reformed. But is also permits the inference that accused gained in cunning and adeptness at concealing his activities as a result of his previous convictions. This choice of inferences should

be left to the jury. Even though time has gone by, the previous convictions show that accused was no novice in the drug traffic.

In *United States v. Valdes*, 229 F. 2d 145 (C.A. 2), three years elapsed between the last prior narcotics conviction and the current offense, and yet no question of remotenes was raised. Similarly, in *Carlton v. United States*, 198 F. 2d 795 (C.A. 9), three years had elapsed and no problem of remoteness was raised, even though the prior conviction was for a misdemeanor.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys.

APRIL 1957.

Office - Supreme Court, U.S.

FILED

AUG 22 1957

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 87

UNITED STATES OF AMERICA

Appellee

—v.—

JOSEPH GEORGE SHERMAN

Appellant

APPELLANT'S BRIEF

HENRY A. LOWENBERG

Attorney for Petitioner

INDEX

	PAGE
Preliminary Statement	1
Statutes Involved	2
Facts	3
POINT I	
The petitioner was entrapped by the Government and petitioner should have been acquitted and the indictment dismissed by virtue of such entrapment	14
POINT II	
The receipt into evidence of the convictions of the petitioner in 1942 and 1946 where the indictment here charged crimes in 1951, without the petitioner taking the witness stand or calling any witnesses, but resting at the conclusion of the Government's case was in violation of Article 5 of the Amendments to the Constitution of the United States	21
POINT III	
Even if this Honorable Court should hold that an accused's record of convictions may be admitted into evidence, without any defense being offered, it is urged that the convictions of the petitioner in 1942 and 1946 were too remote from the crimes charged in 1951 as to make those convictions admissible into evidence, with no evidence offered by the Government about the petitioner from 1946 to 1951	23
CONCLUSION	25
APPENDIX	26

AUTHORITIES CITED

	PAGE
<i>Cases:</i>	
Berger v. United States, 295 U. S. 78	22
Caldwell v. United States, 78 F. 2d 282	24
Enriquez v. United States, 188 F. 2d 313	25
Sorrells v. United States, 287 U. S. 435	18, 19
United States v. Sherman, 200 F. 2d 880	15, 16, 23
United States v. Becker, 62 F. 2d 1007	17
<i>United States Constitution:</i>	
Article 5 of the Amendments to the United States Constitution	21
<i>Statutes:</i>	
21 U. S. C.:	
Section 173	2
Section 174	3

To be argued by

HENRY A. LOWENBERG.

IN THE

Supreme Court of the United States

October Term, 1957

No. 87

UNITED STATES OF AMERICA,

Appellee.

—v.—

JOSEPH GEORGE SHERMAN,

Appellant.

APPELLANT'S BRIEF

Preliminary Statement

Certiorari to the United States Court of Appeals for the Second Circuit has been granted by this Honorable Court to review an affirmance of a judgment of conviction of the appellant by the United States Court of Appeals, Second Circuit, of the crimes of unlawfully, wilfully and knowingly receiving, concealing, selling and facilitating the transportation, concealment and sale of a narcotic drug.

The appellant was sentenced to a term of ten years.

There had been a prior trial of this case which resulted in a conviction of the appellant and a reversal of that judgment of conviction by the Court of Appeals for the Second Circuit.

Statutes Involved

21 U. S. C.:

"Section 173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures—

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections; or which is summarily forfeited as provided in this subdivision, shall be

placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

Section 174. Same; penalty; evidence—* * *

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Facts

This was a retrial of this case. The first trial ended in a conviction which was reversed by the Court of Appeals, Second Circuit, 200 F. 2d 880.

The Government on the trial of the indictment called eight witnesses. CLIFFORD MELIKIAN, an employee of the Federal Bureau of Narcotics, who had testified as a Government's witness on the previous trial, RAYMOND C. RUDDEN, an employee of the Federal Bureau of Narcotics, who had testified as a Government's witness on the previous trial, JAMES C. HUNT, an employee of the Federal Bureau of Narcotics, who had testified as a Government's witness on the previous trial, GEORGE J. ROMIG, JR., chief chemist in the Treasury Department laboratory in New York City, CHARLES KALCHINIAN, who testified as a Government's witness on the previous trial, MICHAEL J. REYNOLDS, narcotic agent, United States Treasury Department, CECIL E. NICKELL, narcotic agent, United States Bureau of Narcotics and ANTHONY J. DRAGO, Special investigator and chief of the identification unit of the Alcohol

and Tobacco Tax Division of the Internal Revenue Service, United States Treasury Department.

The appellant did not testify and did not call any witnesses, but rested at the end of the Government's case.

CLIFFORD MELIKIAN testified that he is a narcotic agent and that on November 1, 1951, he met agent Hunt and special employee Kalchinian in the vicinity of 46th Street and Eighth Avenue. Kalchinian, the informer, got into their car and agent Hunt searched him, found no narcotics and gave him \$15.00. They then drove to 24th Street and Eighth Avenue where Kalchinian got out of the car and he and agent Hunt followed (p. 12). They observed the appellant meet Kalchinian. He observed appellant hand something to Kalchinian and Kalchinian hand something to appellant. Kalchinian returned to the Government's car and Kalchinian gave to him a glassine envelope containing a white substance. He, agent Hunt and Kalchinian initialed the glassine envelope (p. 13). On November 7, 1951, he and agents Hunt and Coyle met Kalchinian. Kalchinian got into the Government's car and Hunt searched Kalchinian and found no narcotics and he gave Kalchinian \$15.00. Kalchinian then got out of the car, met appellant, with him and agent Hunt following. He observed appellant hand something to Kalchinian and Kalchinian hand something to appellant (p. 14). Agent Hunt and he followed appellant, and then went back and met agent Coyle and Kalchinian. Agent Coyle gave him a Pall Mall cigarette package in which was a glassine envelope with a white substance and all then initialed the package. On November 16, 1951, he and agent Rudden met Kalchinian. He copied the serial numbers of a \$10.00

bill and a \$5.00 bill on a piece of paper. Agent Rudden searched Kalchinian, found no narcotics, and he gave Kalchinian \$15.00 (p. 15). This was the same money that he had noted the numbers of. He observed appellant meet Kalchinian, appellant hand something to Kalchinian and Kalchinian hand something to appellant. He followed appellant to 264 West 17th Street where he was joined by agent Rudden. They were admitted to the house by the appellant, where appellant was arrested. He found the \$10.00 bill and \$5.00 bill, which serial numbers had been noted by him, on the person of appellant (p. 16). The paper on which were written the serial numbers of the bills and the bills were received in evidence (pp. 17 and 18). The package which he received from Kalchinian on November 1, he weighed and conducted a field test of its contents which resulted in a positive reaction. He then placed the contents in a lock, sealed envelope and delivered to the Government laboratory (pp. 18-19). With respect to activities on November 7, 1951, he retained custody of the package, tested and weighed it (p. 23). Following the arrest of the appellant on November 16, 1951, agent Rudden gave him a glassine envelope, on which he placed his initials and weighed the contents and placed it in a lock sealed envelope (p. 24).

On cross examination, he testified that he first met Kalchinian, the informer, in the summer of 1951, at which time Kalchinian was under arrest on a narcotic charge (p. 26). The United States Attorney requested of the Court a suspended sentence for Kalchinian on the narcotic charge (p. 27). He was not present at any conversation between Kalchinian and appellant (p. 28). He does not know if Kalchinian would induce anyone to sell him narcotics.

Appellant told him at the time of the arrest that he was operating a rooming house at 264 West 17th Street, and he did not find out anything to the contrary (p. 29). He supposed appellant's income was derived from the rooming house (p. 29). No narcotics were found in appellant's premises although a search was conducted (p. 30). Kalchinian met appellant in the office of Doctor Grossman (p. 31). He did not know that appellant was at the doctor's office for a cure. He did not remember his testimony at the previous trial that the appellant told him that he was at Dr. Grossman's office for a cure for narcotic addiction (p. 31). Dr. Grossman has the practice of attempting to cure narcotic addicts (p. 32). He was not interested as to how the buy was to be made by Kalchinian as long as the buy was made (p. 33).

RAYMOND C. RUDDEN, testified that he is an agent of the Bureau of Narcotics (p. 34). On November 16, 1951, he met agent Melikian and Melikian noted two bills, a \$10.00 bill and a \$5.00 bill. They then met Kalchinian and he searched Kalchinian, found no narcotics. Kalchinian then left the Government's car, met the appellant, and the appellant handed something to Kalchinian (p. 35). Kalchinian then joined this witness and agent Melikian. They entered a Government car and Kalchinian handed him a Chesterfield cigarette package which contained a glassine envelope of white powder. He followed agent Melikian into 264 West 17th Street. Agent Melikian placed appellant under arrest there and from a number of bills taken from appellant were the two bills previously noted by agent Melikian (p. 36). He searched the room in which appellant and Melikian were standing. He turned the package given to him by Kalchinian over to agent Melikian (p. 37).

On cross examination, he testified that he had not met Kalchinian prior to this November 16 (p. 38). He did not find any narcotics in appellant's premises (p. 38). Appellant told him he collected rents for the building (p. 38). He was not interested in finding out how many times Kalchinian spoke to appellant about narcotics (p. 38). He did not check to see whether Kalchinian induced appellant to give him narcotics, nor did he investigate to find out if the appellant was entrapped on this narcotic charge (p. 39). He did not have a search warrant when he searched appellant and appellant did not object when he searched appellant's premises (p. 40).

JAMES C. HUNT testified that he has been a narcotic agent since August 15, 1951. On November 1, 1951, he and agent Melikian met the informer. He searched the informer, found no narcotics or money on him, and agent Melikian gave the informer \$15.00. The informer got out of the car, and he saw the informer meet the appellant. He saw the appellant hand something to the informer and the informer hand something to the appellant. The informer then returned to the Government car where he searched the informer, found no money on him. The informer gave a Pall Mall cigarette package containing a white powder to agent Melikian. He and agent Melikian affixed their initials and date to contents of glassine envelope and Pall Mall package (pp. 41-42). On November 7, 1951, he and agents Coyle and Melikian met the Government informer. He searched the informer, found no narcotics on him, and agent Melikian gave the informer \$15.00. The informer met the appellant and he saw the informer hand something to the appellant and the appellant hand something to the informer (p. 43). He and agent Melikian

followed the appellant, and they then returned to the Government car, at which time agent Coyle had a white powder contained in a glassine envelope, which the informer said he had purchased from appellant. The agents affixed their initials and date to the package (p. 44).

On cross examination, he testified that he knew nothing about the informer. The informer was attached to agent Melikian. He never suggested to agent Melikian to check on the informer, to find out what kind of person he is, or whether he is reliable or not (p. 45). He did not know how the informer met the appellant (p. 46).

GEORGE W. ROMIG, JR., called then as a witness for the Government testified that he is the chief chemist in the Treasury Department laboratory in New York City. He identified a record from his laboratory, Government's Exhibit 2-B for identification which was received in evidence. He also identified Government's Exhibit 3-B as a record from his laboratory which was received in evidence. He also identified Government's Exhibit 4-B as a record of the laboratory maintained by it in the regular course of business (pp. 57-60). He did not know of the accuracy of the "Remarks". Part of the information was furnished by somebody else in the reports. The lower half of the reports is his report (p. 60). The top part of the aforementioned exhibits were typed in by the narcotic agent (p. 62). The records come in with the narcotics and the narcotics are then analyzed and he fills in the bottom of the record. He has no personal knowledge of the contents of the top part of the aforementioned records (pp. 62-63). Exhibits 2B-3B and 4B were received in evidence over appellant's objection and exception (p. 64). The Bureau of Narcotics

submits a form to his office requesting the return of the narcotics and once a month narcotic agents come to his office and pick up the narcotics based on this form and he gets a receipt (p. 64). He then identified Government Exhibit 5 as one of the records which he gets after he gets a receipt for narcotics returned to the Narcotic Bureau. The receipt appears on this record. Exhibit 5 was received in evidence over appellant's objection and exception (pp. 63-64).

The next witness called by the Government was CHARLES KALCHINIAN. He testified that he had been convicted of the crime of the sale of narcotics. Following his arrest for narcotics by a Federal Agent he performed services for the Bureau of Narcotics. At the time of his arrest he was addicted to the use of narcotics (pp. 66-67). He first met appellant in a doctor's office where had gone for a cure of narcotic addiction. He saw appellant in the doctor's office half dozen times. He used to go to a pharmacy to have prescriptions filled and saw appellant also there. He asked appellant about his experiences and appellant asked him about his experiences. He asked appellant if he had been getting drugs, and what quality. He asked appellant if there was a reliable man he could meet and appellant said he knew some people. He asked appellant if he could meet these people and appellant said nothing. He spoke to appellant again on the subject and appellant said "No". He told appellant he was not responding to treatment and needed something to sustain himself (pp. 68-69). Appellant said he might be able to get it. He later again asked appellant and appellant said he was working on it. He asked appellant how he could contact him. Appellant asked him where he could be contacted and he gave appellant his

telephone number (p. 70). They agreed at all times to meet at the corner of 20th Street and Eighth Avenue. Appellant telephoned him about the first part of September and appellant delivered narcotics to him. Appellant telephoned him three or four times a week, but meetings were not always arranged. He decided to report these activities to Federal Bureau of Narcotics toward the end of October (p. 71). He saw agent Melikian (p. 72). He also spoke to a Mr. Levine of the Narcotic Bureau (p. 73). Appellant telephoned him after his visit to Narcotic Bureau. He called agent Melikian and told him that he was to make a purchase. That was on November 1, and he then met agents Hunt and Melikian. He was searched by agent Hunt and Melikian gave him \$15.00. He then met appellant, appellant gave him a package and he gave appellant \$15.00. He then met agent Hunt, and he gave to agent Hunt the package (pp. 74-75). The next time he informed the agents of a pending transaction with appellant was on November 7th. Appellant had called him. An appointment was made. He met agents Hunt, Coyle and Melikian. He was searched by Hunt and Melikian gave him \$15.00. He then met appellant and appellant gave him a package and he gave appellant the \$15.00. He then returned to the Government car, where he was searched by agent Hunt (pp. 76-77). He arranged another purchase from appellant which he did not report (p. 78). On November 16th, he received a call from appellant which he reported to agent Melikian. He made an appointment to meet appellant. He met agents Rudden and Melikian. He was searched by Rudden and Melikian gave him \$15.00. He then met appellant. Appellant gave him a package and he gave appellant the money (p. 78). He then returned to the Government car, and was searched

by agent Rudden. He handed the package to agent Rudden and the package was initialed. He had made other purchases from appellant on his own account which he did not report (pp. 78-79). Prior to dealing with appellant, he made purchases elsewhere at a lower price (p. 80).

On cross examination, he testified he has now entered the field of photography and is living in Pasadena, California (p. 81). The punctures in his arm are from a narcotic needle of 15 years ago (p. 82). He has also used the names of James Ballow and Charles Gleason. At the time of his arrest and conviction for the sale of narcotics, he was a night clerk and manager of a hotel (p. 84). He would spend, during that period, thirty or forty dollars a week for narcotics while his salary was sixty, sixty-five dollars a week. He did not live at the hotel. He denied ever committing a theft (p. 85). To live he borrowed money. This was all a year or two before these incidents. He pleaded guilty to the sale of narcotics (p. 86). He had thirty-five dollars a week to live on, to pay his rent, clothes and food and still paid back loans he had made. On his arrest for sale of narcotics to which he pleaded guilty, he was released on his own recognizance, without bail (p. 88). On the day of sentence, the United States Attorney told the Judge that he had cooperated and been useful to the Government. He did not want to go to jail (p. 89). He helped the Government in at least three cases (p. 90). He was at Dr. Grossman's office for a cure and appellant told him that he also was there for a cure. He saw appellant in Dr. Grossman's office (p. 90). He saw appellant in the doctor's office from time to time and the doctor has been treating addicts. He met appellant in the doctor's office by accident. Sometimes their appointments at the doctor's office

happened to be at the same time. After seeing appellant in doctor's office two or three times, he said "hello" to appellant. Outside of the doctor's office, they discussed narcotics. He broached the subject two or three times to appellant about getting narcotics. The appellant just listened (p. 93). Knowing that appellant was at the doctor's office for a cure of narcotics addiction, he spoke to appellant about narcotics (p. 94). He approached appellant two or three times to supply narcotics (p. 96). He told agents, during the previous trial, that he thought we were getting along all right (p. 97). He had promised to cooperate before his sentence (p. 99). It was his job, while working with the agents, to go out and try to induce a person to sell narcotics to him (p. 100). He did not know how to answer the question whether he would be prepared to send an innocent man up to help himself (p. 101). Appellant told him that he was a handyman. On the previous trial, he testified that appellant told him he was giving him half the narcotics he had bought. The appellant said he had paid \$25.00 and that he would have to give appellant \$15.00. The appellant told him he had tax expenses (p. 108). On the previous trial, he testified that he and appellant were taking a withdrawal treatment by Dr. Grossman (p. 110). On previous trial, he testified that when he broached the subject of narcotics to appellant, appellant just listened (p. 112). The second time, they both talked on the subject (p. 113). The Bureau of Narcotics made suggestions to him as to how to approach appellant (p. 115). In addition, to appellant telling him that he, appellant, was at the doctor's office for a cure, he knew that appellant was going to same pharmacy as he to have his prescriptions filled (p. 124). On redirect examination, he testified that he would not frame an innocent man (p. 125).

MICHAEL J. REYNOLDS testified that he is a narcotic agent. He prepared a schedule of drugs received, confiscated and surrendered to Drug Disposal Committee. He was shown Government Exhibit 6 and it was such schedule (p. 127). He was shown Government Exhibit 7 and identified that as the Government bill of lading showing a shipment to Drug Disposal Committee of Bureau of Narcotics (pp. 128-129).

CECIL E. NICKELL testified that he is a narcotic agent and is a member of Drug Disposal Committee assigned to Washington, D. C. (p. 130). He identified Government Exhibit 8 as a record of drug shipments. The receipt of shipment in Government Exhibit 7 is shown on Exhibit 8 (p. 131). He identified Government Exhibit 9 as a schedule of drugs shipped to Drug Disposal Committee which schedule is on the inside of the box of drugs (p. 132). It is the same as shown in Government Exhibit 8 (p. 133). He could not testify that any substance delivered to him was a narcotic drug (p. 134).

The Government then offered into evidence, over objection by appellant and motion made by appellant for a mistrial, Exhibits 10 and 11. Exhibits 10 and 11 are the files of the Court, numbers C112-103, C124-58, showing that appellant had been convicted twice before of narcotics (pp. 136-137-138).

CLIFFORD MELIKIAN, then recalled by the Government testified that following the arrest of the appellant, he took appellant to the Bureau of Narcotics where appellant was fingerprinted and photographed (p. 139). The fingerprint cards are submitted to the identification branch of Federal Bureau of Investigation. He identified Exhibit 12 as in

formation he received from the FBI as a result of these prints about the appellant (p. 139). There was then a long colloquy between the trial court, assistant United States Attorney and counsel for appellant as to Exhibit 12, a report received from FBI, (pp. 139 to 148). The Court received in evidence record of convictions of a man named Sherman for 1942 and 1946 (p. 146).

CLIFFORD MELIKIAN, over constant objection of appellant, continued to testify that it is the custom of Bureau of Narcotics to place an index number on each case. That number goes on fingerprint charts (p. 150). He then identified Form 121, which is a record kept by the Federal Bureau of Narcotics which gives the name of defendant, date of conviction and disposition by the Judge and which contains the docket number of the Federal Court (p. 153). The Court received all records pertaining to previous convictions of appellant for narcotics over appellant's objections (pp. 154 to 174).

The appellant rested at the end of the Government's case. The appellant did not take the witness stand nor did he offer any evidence.

POINT 1

The appellant was entrapped by the Government and appellant should have been acquitted and the indictment dismissed by virtue of such entrapment.

It cannot be disputed that the appellant and the special informer for the Government, Charles Karshinian met in a doctor's office where the appellant went for a cure from narcotic addiction. The special employee for the Government approached appellant about narcotics two or three

times, even telling appellant that he was not responding to treatment. The appellant finally weakened. They had met in the doctor's office half dozen times and went together to the pharmacy to have their prescriptions filled. The narcotics appellant obtained at the instigation of Government informer were divided between appellant and this informer. The appellant paid twenty-five dollars for narcotics and the special employee gave appellant fifteen dollars which included cab fare. The special employee was under criminal charges for dealing in narcotics when he made these purchases. He was used as a decoy to make a case against the appellant. So here we have a situation where the appellant is at a physician's office to rehabilitate himself, to cure himself of narcotic addiction, and to get himself away entirely from any dealings with narcotics whatsoever, and there he is approached by a special employee of the Bureau of Narcotics. There is no evidence that the appellant was engaged in the traffic of narcotics at that time.

This was a retrial of this indictment. The previous trial ended in a judgment of conviction and a reversal of the judgment of conviction, *United States v. Sherman*, 200 F. 2d 880.

On this retrial of this indictment, the Government produced the same witnesses, only with the exception that proof was produced by the Government that the narcotics were destroyed and proof of the appellant's prior convictions for narcotics as a direct part of the Government's case, without the appellant taking the witness stand or offering any proof, but resting his case at the end of the Government's case.

On this same evidence, the Court, in reversing the previous conviction of this appellant, on this indictment held that this appellant was entrapped by the Government into committing this crime, *United States v. Sherman*, 200 F. 2d 880. The Court at pages 882-883 of this case said:

"Therefore in such cases two questions of fact arise: (1) did the agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense. On the first question the accused has the burden; on the second the prosecution has it. In the case at bar plainly Kalchinian did induce the first sale, but that was irrelevant, unless at that time the two had made the agreement described above. If they did, it would be true that the later sales resulted from Kalchinian's original inducement for it meant that he was in the market, so to say, and might buy whenever Sherman had any heroin to offer. *Although, as we have said, on that issue Sherman had the affirmative the evidence to support the defense was ample, if indeed not conclusive. On the other hand since the prosecution had the burden upon the issue of the excuse for inducement, it had to satisfy the Jury that Sherman did not need any persuasion; but that he stood ready to procure heroin for anyone who asked for it; and the evidence scarcely supported such a finding. So far as appeared, Sherman shared his heroin with Kalchinian as a fellow addict, and without profit. That was no evidence that he was in the habit of dispensing heroin, any more than his habit of buying it illicitly for himself or than the furtive way in which he wrapped up the heroin. We need not however decide that the refusal to direct a verdict required*

a dismissal of the indictment because there must be a reversal anyway, and upon a new trial there may be other evidence of Sherman's dealings in narcotics."

In the case of *United States v. Becker*, 62 F. 2d 1007, Judge Hand in holding that the defendant was not entrapped, stated at page 1008:

"The precise limits were left open as to what would excuse such instigation. The only excuses that Courts have suggested so far as we can find, are these: an existing course of similar criminal conduct; the accused's already formed design to commit the crime or similar crimes; his willingness to do so, as evinced by ready complaisance."

The Court further stated, at page 1008:

"However, it has been uniformly held that when the accused is continuously engaged in the proscribed conduct, it is permissible to provoke him to a particular violation which will be no more than an instance in a uniform series."

There is no evidence in this case that the appellant was dealing in narcotics at the time of this indictment. The two previous convictions of appellant, which were received in evidence as a part of the Government's case, over objection by appellant and denial of a mistrial, were in 1942 and 1946 while the indictment here charged a violation of the narcotic law in the year 1951. There was no evidence offered by the Government to show that the appellant was engaged in sales of narcotics from the date of his last conviction in 1946 to the dates of the crimes charged in this indictment, which were in the year 1951. In other words,

there was no proof at all offered by the Government as to the appellant from 1946 to 1951, a lapse of five years. There therefore was no evidence that appellant was continuously engaged in the traffic. As a matter of fact, Kalchinian, the Government's witness, testified that the appellant was a handyman.

The leading case on the law of entrapment is *Sorrells v. United States*, 287 U. S. 435 (1932). In that case, a prohibition agent went to the defendant's home, accompanied by three residents who knew the defendant well. The agent asked the defendant if he could get him some liquor. Defendant stated that he did not have any. The agent made a second request without result. On the third request, defendant left his home and after a few minutes came back with a half gallon of liquor. The agent testified that he was the first and only person among those present at the time who said anything about securing liquor, and that his purpose was to prosecute the defendant for procuring and selling it. To support this testimony, the Government called three witnesses who testified that the defendant had the general reputation of rum runner. There was no evidence, however, that the defendant had ever possessed or sold any intoxicating liquor prior to the transaction in question.

The Court held that the evidence was sufficient to warrant a finding that the act for which defendant was prosecuted was instigated by the agent, that it was the creature of his purpose, and that the defendant had no previous disposition to commit it, also that the agent lured the defendant, otherwise innocent, to its commission by repeated and persistent solicitation (p. 441).

The facts in this instant case can be favorably compared to the facts in case of *Sorrells v. United States*, 287 U. S. 435, above cited. In the case at bar, Kalchinian, the informer for the Government, instigated the crimes here by soliciting appellant two or three times to obtain narcotics, to be divided between them. He instigated the crimes here knowing full well that appellant was being treated by a physician for narcotic addiction, having met appellant in the doctor's office. The evidence here shows that the crimes here were the creature of Kalchinian and that he lured appellant, otherwise innocent, into obtaining narcotics for him and appellant, to be divided between them.

So here we have a situation where the appellant is at a physician's office to rehabilitate himself, to cure himself of narcotic addiction, and to get away entirely from any dealings with narcotics whatsoever, and there he is approached by a special employee of the Bureau of Narcotics. To condone such a practice would merely mean that any addict who wishes to rehabilitate himself and to cure himself of narcotic addiction could be made the subject of a party to a sale and thereby destroy any hope for that individual's attempt to rehabilitate himself and cure himself. For this Court to condone this conduct will merely mean that any addict would not even be safe in a doctor's office for fear that he might be approached by an informer for the Government and induced to participate in a division of narcotics between them.

In affirming the judgment of conviction on February 4, 1957 of this appellant, the United States Court of Appeals in part said:

"On that appeal we set aside appellant's conviction because of error in the charge. This error was

corrected on the second trial and the evidence was sufficient to warrant a finding 'that the accused was ready and willing to commit the offense charged, whenever the opportunity offered.' The jury was justified in regarding appellant's hesitancy as no more than prudent caution on the part of an experienced trafficker in narcotics. Certainly his *modus operandi* suggested such experience. Nor was the jury bound to accept appellant's statement that the sales were without profit. Kalchman testified that he had obtained the same quantities from his prior supplier at lower rates. Appellant's prior convictions were of course cogent evidence of a predisposition to commit the offenses charged. Appellant's last conviction was in 1946, five years before the offenses charged, but he does not appear to have strayed far from the trade. He was obtaining drugs illegally during the intervening period and it was a permissible inference that he had not changed his ways. In this connection it may be noted that his second conviction was separated from the first by a gap of four years and that the fact that he continued to traffic in narcotics following his first conviction indicated a disposition to continue his trade despite detection and punishment."

There was not a word of evidence as to the appellant from 1946 to 1951, when in the year 1951 the appellant was in the office of a doctor for a cure for addiction to narcotics where by chance he met the informer for the Government who was also there for a cure. When the appellant became addicted to the use of narcotics is an open question. The Government offered no evidence of that. It may have been a month or two months before the appellant visited the doctor. Yet the Court of Appeals drew an inference not predicated on any facts in evidence.

POINT II

The receipt into evidence of the convictions of the appellant in 1942 and 1946 where the indictment here charged crimes in 1951, without the appellant taking the witness stand or calling any witnesses, but resting at the conclusion of the Government's case was in violation of Article 5 of the Amendments to the Constitution of the United States.

Article 5 provides:

"No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." (Italics ours.)

There was no evidence offered by the Government at the trial as to the appellant from 1946 to 1951. Surely a lapse of five years without any evidence cannot show a predisposition on the part of the appellant to commit a crime or show any criminal intent. Surely it is not to be said that because one has committed a crime several years before his indictment on another crime, that with that lapse of years, a defendant had a continuing predisposition to commit a crime or crimes and had a continuing criminal intent. If that were the case, then anyone who had ever been convicted of a crime would have no chance to readjust himself.

In the case of *Berger v. United States*, 295 U. S. 78, at page 88 this Honorable Court stated:

“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”

It is therefore urged that the receipt into evidence of the previous convictions of appellant as a part of Government's direct case, in 1942 and 1946, without appellant testifying, but resting at the end of Government's case, surely was compelling the appellant to be a witness against himself in violation of Article 5 of the Amendments to the United States Constitution. It was also a denial of due process of law and a denial of a fair trial. It is submitted that the office of the United States Attorney surely cannot take issue with the fact that the receipt into evidence of the appellant's two convictions in 1942 and 1946 must have had a marked effect on the Jury.

POINT III

Even if this Honorable Court should hold that an "accused's record of convictions may be admitted into evidence, without any defense being offered, it is urged that the convictions of the appellant in 1942 and 1946 were too remote from the crimes charged in 1951 as to make those convictions admissible into evidence, with no evidence offered by the Government about the appellant from 1946 to 1951.

The Government showed nothing about the appellant from the date of his last conviction in 1946 and crimes here now charged in 1951. There was a lapse of five years with no evidence about the appellant. The fact that the appellant was convicted in 1942 and 1946 for narcotics, that in itself, would not show that the appellant was in the habit of dispensing heroin even on those dates. Surely with a period of five years intervening between the conviction of appellant in 1946 and this crime of 1951, with no evidence about the appellant during this five year period, surely could not show that he was engaged in dispensing heroin during five years after the last conviction. With no evidence about the appellant during this period, surely a lapse of five years from the date of the last conviction would be too remote. In fact, when the Court used the expression in the opinion in *United States v. Sherman, supra*, "that was no evidence that he was in the habit of dispensing heroin, any more than his habit of buying it illicitly for himself or than the furtive way in which he wrapped up the heroin," the Court could only have meant about the time of the crimes in 1951 charged herein, and not related to appellant's past conviction in 1946.

With respect to the Government's contention that appellant's convictions in 1942 and 1946 would show a criminal intent, that cannot be even considered worthy but is utterly ridiculous. How can a conviction in 1946 show that the individual had a criminal intent five years later to commit a crime. Where is the line to be drawn? Is this Court prepared to say that a man convicted in 1946 and charged with having committed a crime in 1951, that that lapse of five years would show a criminal intent, but if it were six years, it would show no criminal intent? No evidence was introduced or offered by the Government about appellant during that five year period.

In *Caldwell v. United States*, 78 F. 2d 282, at the time of the trial the defendant was twenty-six years of age and one of the Government's witnesses was permitted over the objection of the defendant's counsel to testify that an investigation disclosed that the defendant had been sentenced in a Federal Court, about the year 1925, for violation of the National Prohibition Act. This prior conviction of the defendant happened ten years before the trial. The Court in that case held that while it is well settled that evidence of similar transactions may be admissible, under certain circumstances, as bearing upon the question of intent, purpose, design, or knowledge, the transaction, the testimony as to which was here permitted to be presented to the jury, was entirely too remote and the evidence was not admissible. (p. 283).

In offering the previous convictions of appellant, without appellant taking the witness stand and not offering any evidence of good character but resting on the Government's case, the Government relied also on the case of

Enriquez v. United States, 188 F. 2d 313. In that case the defendant and five others were charged with the sale of narcotics and conspiracy. In that case, the Court said:

"The effort to capitalize on the alleged error in admitting this record is beset with serious procedural difficulties. At a later stage of the trial appellant took the witness stand and testified generally and at length in his own defense. This being so, his prior conviction might have been proved in due course either by cross examination or by production of the record, so that the fact and nature of the conviction would presumably have been gotten before the jury in any event" (p. 316).

In this case, appellant rested on the Government's case, without testifying or introducing any evidence of good character. Therefore the case of *Enriquez v. United States, supra*, relied on by the Government at the trial does not apply.

CONCLUSION

The judgment of conviction of appellant should be reversed and the indictment dismissed.

Respectfully submitted,

HENRY A. LOWENBERG
Attorney for Appellant

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 172--October Term, 1956.

(Argued December 10, 1956 Decided February 4, 1957.)

Docket No. 24342

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH GEORGE SHERMAN,

Appellant.

Before:

SWAN, MEDINA and WATERMAN,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Thomas F. Murphy, Judge.

Defendant appeals from a judgment of conviction of selling narcotics in violation of 21 U. S. C. Section 174. Affirmed.

Appendix

PAUL W. WILLIAMS, United States Attorney for the Southern District of New York, New York City (Malcolm Monroe and Maurice N. Nessen, Assistant United States Attorneys, New York City, of Counsel), for *appellee*.

HENRY A. LOWENBERG, New York City, for *appellant*.

MEDINA, *Circuit Judge*:

This appeal is from a judgment of conviction under an indictment charging sales of narcotics on three occasions in violation of 21 U. S. C. Section 174. The evidence established the following facts: appellant and one Kalchinian, both addicted to the use of narcotics, became acquainted as a result of meeting several times in the office of the physician whom they were consulting in an effort to cure their addiction and in the pharmacy to which they took their prescriptions to be filled. After several casual greetings, they began to discuss their experiences in the use of narcotics. In response to a question, appellant told Kalchinian that he was then purchasing drugs. Kalchinian, who was not responding well to treatment, informed appellant of this fact and requested an introduction to appellant's supplier. After two or three such requests, appellant stated that the man was going out of business and for this reason he could not introduce appellant to him. Upon Kalchinian's asking, "How can I then?" appellant said he might be able to get some drugs for him. To a subsequent inquiry appel-

Appendix

lant replied that he was working on it. Kalchinian asked how he could get in touch with appellant, but appellant suggested instead the following procedure. If and when he had drugs for Kalchinian he would telephone him and tell him what time to meet him. Appellant took Kalchinian's telephone number and designated a certain street corner as the meeting place. He said that he expected to purchase heroin at \$25 for 1/16 ounce and that he would let Kalchinian have half that amount for \$15, explaining that the additional \$2.50 was for his cab fare and trouble. Kalchinian agreed to these arrangements, and several transfers took place. Later Kalchinian, who was awaiting sentence on a narcotic charge to which he had pleaded guilty and who had previously worked with the Federal Bureau of Narcotics on two cases, for the first time informed the Bureau of his dealings with appellant.

On the three dates charged in the indictment, agents observed Kalchinian exchange \$15 for a small quantity of heroin contained in a glassine envelope concealed in an empty cigarette package. The government also proved, over appellant's objection, that he had twice before been convicted on narcotic charges: in 1942 for selling opium and in 1946 of possession of 720 grains of morphine in 5-grain capsules, 261 grains of heroin in six cellophane bags, and two ounces of opium in three jars.

The principal issues on this appeal revolve about the defense of entrapment. The Supreme Court has held "the controlling question" under this defense to be "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own

Appendix

officials." *Sorrells v. United States*, 287 U. S. 435, 451. Thus, if it be shown without more that the defendant was induced by government agents to engage in the proscribed activity, no conviction may be had. *United States v. Masciale*, 2 Cir., 236 F. 2d 601; *United States v. Sherman*, 2 Cir., 200 F. 2d 880. But "the defense of entrapment is not simply that the particular act was committed at the instance of government officials. That is often the case where the proper action of these officials leads to the revelation of criminal enterprises." *Sorrells v. United States, supra*. "There is no entrapment when a purchase is made at the instance of the law officers where the seller is ready and willing, without persuasion and awaiting any propitious opportunity, to commit the offense." *United States v. White*, 2 Cir., 223 F. 2d 674.

On a prior appeal in the case at bar, *United States v. Sherman, supra*, Judge Learned Hand stated, page 882:

"As we understand the doctrine it comes to this: that it is a valid reply to the defence, if the prosecution can satisfy the jury that the accused was ready and willing to commit the offence charged, whenever the opportunity offered. In that event the inducement which brought about the actual offence was no more than one instance of the kind of conduct in which the accused was prepared to engage; and the prosecution has not seduced an innocent person, but has only provided the means for the accused to realize his pre-existing purpose. The proof of this may be by evidence of his past offences, of his preparation, even of his 'ready complaisance.' Obviously, it is not necessary that the past offences proved shall be precisely the same as that charged, provided they

Appendix

are near enough in kind to support an inference that his purpose included offences of the sort charged."

On that appeal we set aside appellant's conviction because of error in the charge. This error was corrected on the second trial and the evidence was sufficient to warrant a finding "that the accused was ready and willing to commit the offence charged, whenever the opportunity offered." The jury was justified in regarding appellant's hesitancy as no more than prudent caution on the part of an experienced trafficker in narcotics. Certainly his *modus operandi* suggested such experience. Nor was the jury bound to accept appellant's statement that the sales were without profit. Kalchinian testified that he had obtained the same quantities from his prior supplier at lower rates. Appellant's prior convictions were of course cogent evidence of a predisposition to commit the offenses charged. Appellant's last conviction was in 1946, five years before the offenses charged, but he does not appear to have strayed far from the trade. He was obtaining drugs illegally during the intervening period and it was a permissible inference that he had not changed his ways. In this connection it may be noted that this second conviction was separated from the first by a gap of four years and that the fact that he continued to traffic in narcotics following his first conviction indicated a disposition to continue his trade despite detection and punishment.

Appellant contends that evidence of these prior convictions was improperly admitted since "It is elementary that the convictions of a defendant may be received in evidence only if the defendant testifies in his own behalf or intro-

Appendix

duces evidence of good character." But, there are exceptions to this rule, 2 Wigmore, Evidence §§300-373, and one of them is that such evidence is admissible to negative the defense of entrapment. The Supreme Court stated in *Sorrells v. United States, supra*, "The predisposition and criminal design of the defendant are relevant. * * * if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense."

Justice Roberts dissented in *Sorrells* and Justices Brandeis and Stone joined in his dissent. The theory of the dissenters was that it was the function of the court alone to determine the question of whether the court was being made "the instrument of wrong," due to fraudulent or improper conduct of law enforcement officers, and that the submission of the issue of entrapment with the other issues for a general verdict was in effect construing a penal statute "as containing an implicit condition that it shall not apply in the case of entrapment." This reasoning was supported by a further argument closely touching the case now before us. Justice Roberts commented on the fact that it was common practice in criminal trial in which the defense claimed entrapment to permit the government in rebuttal to show "that the officer guilty of incitement of the crime had reasonable cause to believe the defendant was a person disposed to commit the offense," and he continued (at p. 458): "This procedure is approved by the opinion

Appendix

of the court. The proof received in rebuttal usually amounts to no more than that the defendant had a bad reputation, or that he had been previously convicted." All this was said to support the view of the dissenters that the crime as defined in the statute made no reference to entrapment, that such a question merely affected the purity of the judicial process which was matter for the court alone. But the argument was rejected, and it is thus clear, as thus stated by Justice Roberts, that it was the considered position of the majority of the Court that a defendant's prior convictions were admissible to negative the defense. We have explicitly adopted this rule. *United States v. Sherman, supra; United States v. Johnson*, 2 Cir., 208 F. 2d 404, cert. denied 347 U. S. 928. See also *Carlton v. United States*, 9 Cir., 198 F. 2d 795.

It has been argued that these decisions are not applicable here, since they deal only with the introduction of such evidence in rebuttal, whereas in the case at bar the evidence of prior convictions was admitted as part of the government's case in chief. But to understand these decisions as making the admissibility of such evidence always depend upon whether the defendant had introduced evidence would emasculate the rule and work grave prejudice to the government in cases where defendant, as here, elected to go to the jury on the proofs adduced by the prosecution in its case in chief. Accordingly, we reject appellant's contention that no evidence of a predisposition to commit the crime and no proof of prior convictions may ever be introduced by the government except in rebuttal to affirmative evidence of entrapment adduced by defendant. But we are not called upon to, nor do we, propound any broad general rule

Appendix

on the subject. We do not now hold that evidence of predisposition or prior convictions may be introduced by the prosecution whenever there is a possibility that entrapment will be invoked as a defense.

"This is one of those classes of cases where it is safer to prick out the contour of the rule empirically, by successive instances, than to attempt definitive generalizations."

In re All Star Feature Corp., 231 Fed. 251 (L. Hand, J.).

We now need go no further than to hold that proof of prior convictions is admissible as part of the prosecution's case in chief where it is clear, as in the case before us, that the defense will be invoked.

There can be no doubt that such was appellant's intention in the case at bar. On the first trial, he introduced no evidence but requested a charge on entrapment, relying on the testimony of Kalchinian. When his attorney was informed by the prosecutor that Kalchinian would not testify on the second trial, he demanded that the government call him again, evidently so that he could again rely on the defense. He informed the court that he would do so, and devoted his entire opening statement to a denunciation of Kalchinian, telling the court and jury that appellant had been entrapped. His cross-examination was of the same pattern, bringing out the facts relevant to entrapment.

Under these circumstances it was proper for the government to introduce evidence of the prior convictions.

Appellant further contends that, because of the passage of time between the prior convictions and the offenses charged, the evidence should have been excluded as unduly prejudicial. We disagree. While it is doubtless true that the more remote the prior convictions the less their proba-

Appendix

tive force, we are not prepared to say that on this record the probative force of these prior convictions was outweighed by the possibility that they might prejudice the jury. Cf. *Enriques v. United States*, 9 Cir., 188 F. 2d 313.

Appellant's only other contention is that the transfers proven were not "sales" within the meaning of the statute, since the evidence showed that appellant was sharing the narcotics without profit. This contention must fail, for: (1) the jury may have believed that appellant was making the transfers and disbelieved his reported statement that he was doing so without profit; and (2) the statute enjoins all sales, not merely sales for profit.

Affirmed.

LIBRARY
SUPREME COURT, U.S.

FILED

SEP 16 1957

JOHN T. PEY, Clerk

No. 87

In the Supreme Court of the United States

OCTOBER TERM, 1957

JOSEPH GEORGE SHERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,

Solicitor General,

WARREN OLNEY III,

Assistant Attorney General,

BEATRICE ROSENBERG,

ROBERT G. MAYSACK,

Attorneys,

Department of Justice, Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Statement	2
Summary of argument	16
Argument	12
I. The issue of entrapment was properly submitted to the jury under proper instructions	12
II. Petitioner's previous narcotics convictions were admissible as part of the government's case since his counsel, in opening statement and in cross-examination of government witnesses, had already injected the entrapment defense	16
Conclusion	22

CITATIONS

Cases:

<i>Adams v. United States</i> , 220 F. 2d 297	15
<i>Caldwell v. United States</i> , 78 F. 2d 282	21
<i>Carlton v. United States</i> , 198 F. 2d 795	16, 20
<i>Cratty v. United States</i> , 163 F. 2d 844	17
<i>Enriquez v. United States</i> , 188 F. 2d 313	20
<i>Gilmore v. United States</i> , 228 F. 2d 121	17
<i>Goldsby v. United States</i> , 160 U. S. 70	19
<i>Kettenbach v. United States</i> , 202 Fed. 377, certiorari denied, 229 U. S. 613	21
<i>King v. United States</i> , 144 F. 2d 729	21
<i>Lewis v. United States</i> , 11 F. 2d 745	17
<i>Masciale v. United States</i> , No. 84, O. T. 1957	12
<i>Mitchell v. United States</i> , 143 F. 2d 953	17
<i>Mitchell v. United States</i> , 213 F. 2d 951, certiorari denied; 348 U. S. 912	20
<i>Neill v. United States</i> , 225 F. 2d 174	19
<i>Nutter v. United States</i> , 289 Fed. 484	17
<i>People v. Stolt</i> , 143 Cal. 689	17

Cases—Continued

	Page
<i>Reece v. United States</i> , 131 F. 2d 186, certiorari denied, 318 U. S. 759	19
<i>Saundin v. United States</i> , 31 F. 2d 732	17
<i>Sherman v. United States</i> , 241 F. 2d 329, certiorari denied, 354 U. S. 911	17
<i>Sorrells v. United States</i> , 287 U. S. 435	11, 13, 19, 20
<i>State v. Olivieri</i> , 49 Nev. 75	17
<i>Swaltum v. United States</i> , 39 F. 2d 390	17
<i>Trice v. United States</i> , 211 F. 2d 513, certiorari denied, 348 U. S. 900	20
<i>United States v. Becker</i> , 62 F. 2d 1007	13
<i>United States v. DeMarie</i> , 226 F. 2d 783, certiorari denied, 350 U. S. 966	17
<i>United States v. Johnson</i> , 208 F. 2d 404, certiorari denied, 347 U. S. 928	17
<i>United States v. Moses</i> , 220 F. 2d 166	15
<i>United States v. Riccardi</i> , 174 F. 2d 883, certiorari denied, 337 U. S. 941	19
<i>United States v. Sawyer</i> , 210 F. 2d 109	15
<i>United States v. Sherman</i> , 200 F. 2d 880	2
<i>United States v. Valdes</i> , 229 F. 2d 145, certiorari denied, 350 U. S. 996	17, 20
<i>Williams v. United States</i> , 151 F. 2d 736	19
<i>Wolstein v. United States</i> , 80 F. 2d 779	21

Statutes:

21 U. S. C. 173	2
21 U. S. C. 174	2

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 87

JOSEPH GEORGE SHERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 210-216) is reported at 240 F. 2d 949. A previous opinion in the case is reported at 200 F. 2d 880.

JURISDICTION

The judgment of the Court of Appeals was entered on February 4, 1957 (R. 217). The petition for a writ of certiorari was filed on March 4, 1957, and was granted on April 22, 1957 (R. 218). 353 U. S. 935. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, on petitioner's trial for narcotics violations, the issue of entrapment was properly sub-

mitted to the jury under proper instructions, or whether a verdict should have been directed for petitioner on that issue.

2. Whether, where the defense indicated in its opening statement and in cross-examination of prosecution witnesses that it was relying on the defense of entrapment, the government could properly prove petitioner's two prior narcotics convictions as part of its direct case.

STATEMENT

The first trial of petitioner in the United States District Court for the Southern District of New York resulted in a conviction for three sales of heroin (three counts) in violation of 21 U. S. C. 173 and 174. This conviction was reversed in *United States v. Sherman*, 200 F. 2d 880 (C. A. 2), because of erroneous instructions on the defense of entrapment. In the second trial, the jury found petitioner guilty on all three counts (R. 194). Petitioner admitted two previous federal narcotics convictions, and was sentenced to concurrent terms of imprisonment for ten years on each of counts 1, 2, and 3, with fines of \$1.00 on each of these counts being remitted (R. 200). On appeal, the conviction was unanimously affirmed (R. 217).

The evidence at the second trial may be summarized as follows:

1. In May or June 1951, Charles Kalchinian, a drug addict, was arrested by an agent of the Federal Bureau of Narcotics for illegal sale of narcotics (R. 66-67, 26). Thereafter, by agreement, he served as a special employee or agent of that Bureau while at liberty on his own recognizance (R. 12, 67, 88-89, 99).

During the latter part of August 1951, Kalchinian by chance met petitioner at the office of a Dr. Grossman, who had a reputation for curing drug addicts (R. 68, 90, 91, 32). At first, Kalchinian and petitioner merely exchanged routine greetings and discussed their mutual experiences (R. 68, 91). Later, Kalchinian indicated that he was not responding well to treatment, and asked petitioner if he had a reliable man whom he (Kalchinian) could meet as a source for narcotics (R. 69, 94). Petitioner stated that he did know some people, but was generally non-committal regarding this inquiry (R. 69, 92). After several requests by Kalchinian to meet petitioner's contact, petitioner stated that this would be impossible since "the man was going out of business" (R. 69, 93, 94). Upon Kalchinian's asking how under these circumstances he could obtain narcotics, petitioner stated that he might be able to get them for Kalchinian (R. 70). When Kalchinian again asked petitioner for narcotics, petitioner replied that he was "working on it" (R. 70, 94).

Kalchinian inquired of petitioner as to how he could contact him if petitioner was going to procure narcotics. Petitioner suggested a procedure under which he would telephone Kalchinian at work "whenever he [petitioner] was ready." A certain street corner was designated as the meeting place, and petitioner would merely telephone, identify himself, and tell Kalchinian the hour to meet him (R. 70, 71). Petitioner stated that he would purchase $\frac{1}{16}$ ounce of heroin for \$25 and sell one half of it to Kalchinian for \$15, with the understanding that the additional

\$2.50 should cover petitioner's taxi fare and expenses (R. 91-92, 108). About the first part of September, petitioner began telephoning Kalchinian about three or four times a week, and narcotics sales were made pursuant to these arrangements (R. 71). Toward the end of October, 1951, Kalchinian informed the government agents that he had found a person from whom he could purchase narcotics, and arrangements were made to make the "buys" for which petitioner was convicted (R. 71-74, 114).

On November 1, 1951 (count one), Kalchinian informed federal agent Melikian that he intended to purchase narcotics from petitioner later that day (R. 74, 12). Agents Melikian and Hunt searched Kalchinian to insure that he was not then in possession of any narcotics, and gave him \$15 in government currency to make the "buy" (R. 12, 41, 74). Thereafter, Kalchinian met petitioner according to their arrangement, purchased a white substance enclosed in a small glassine envelope, and gave the agents a signal indicating the purchase by putting a newspaper in his pocket. The agents again searched Kalchinian, received from him the white powder, and found no currency on his person (R. 13, 41-43, 75). This procedure was repeated on November 7 (count two) (R. 14-15, 43-44, 76-77) and on November 16, 1951 (count three) (R. 15-16, 35-36, 78-79). Petitioner was arrested after the purchase on November 16, and the purchase money which had been given to Kalchinian on that date was found on petitioner's person (R. 16-17, 36-37). Upon subsequent laboratory

analysis, the substance purchased in each instance turned out to be heroin (R. 57-66).

Kalchinian testified that during the period between November 1 and November 16, 1951, he purchased other narcotics from petitioner without informing the agents of these sales (R. 75-76, 77-78). Except for the newspaper signal, all of Kalchinian's purchases from petitioner (other than those involved in the indictment) followed the same general pattern as the three purchases charged in the indictment (R. 79). Prior to his purchases from petitioner, Kalchinian had been buying his narcotics in the same quantities from another dealer, but for a lower price than he paid petitioner (R. 80-81, 116).

2. Petitioner did not testify on his own behalf; nor did he call any witnesses. In his counsel's opening statement to the jury (R. 202-204), however, it was emphasized that petitioner intended to rely upon the defense of entrapment as shown by the activities of the government agents and the government informer, Kalchinian. Pertinent parts of this opening statement are as follows (R. 202-203, 204):

We intend to prove through the Government's own informer [Kalchinian] that this informer had been convicted for the sale of narcotics and to save himself from jail he decided to assist the Bureau of Narcotics and had the United States Attorney plead in his behalf when he appeared for sentence.

We intend to show that this defendant was a narcotic addict who was up at a Dr. Grossman's office for a cure to get rid of this habit and so

this informer was also present for a cure. They met by accident, by chance.

This informer, building up cases for the Department of Narcotics, decided that he would dupe this defendant although this defendant was not willing and ready to perform the act, that he would induce this defendant, entrap him into a division between them of narcotics for no profits whatsoever.

* * * * *

And we will show you that [narcotics sales by petitioner to Kalchinian] happened once, twice, three times, and during all this time this informer was in contact with the Bureau of Narcotics, taking a helpless addict who was at a doctor's office for a cure to rid himself of that habit, and inducing him against his will to violate the narcotics laws.

Then we will show you that the agents arrived at the scene and observed this pass of narcotics. The Government will show you that. * * *

* * * * *

This defendant would not be on trial today lady and gentlemen if it were not for the despicable actions of an addict, of an informer, who would jeopardize anybody's liberty, and it could have been anybody, in order to make a case for the Federal Bureau of Narcotics, because he was under an obligation. Just keep that in mind. This defendant was up at a doctor's office as an addict for a cure, being approached by this contemptuous, scurrilous informer who induced him after speaking to him a few times about getting narcotics so that they could divide it between them.

Now, it is our contention that not having been a sale, and with the tremendous profit in narcotics, as you well know about, that this contemptible, scurrilous informer was out to frame this defendant, to induce him to commit the crime so he could come back to the Bureau of Narcotics and say, "Here I delivered another case for you in payment for my liberty."

In cross-examination of Kalchinian, defense counsel questioned at length in order to develop the contention that petitioner had been entrapped by Kalchinian into making the illegal narcotics sales (R. 92-97, 100, 103-104, 107-108, 112-116, 121). Such questions were asked as "So you had in mind, did you not, Mr. Kalchinian, to keep after this defendant in order to induce him to sell you narcotics?" (R. 94); "And it was your job, was it not, while you were working with these agents to go out and try and induce somebody to sell you narcotics, isn't that true?" (R. 100); "And you broached the subject [of narcotics sales] to this defendant, did you not, for the purpose of making a case against him?" (R. 114). In the cross-examination of agent Rudden, defense counsel inquired, "Were you interested in finding out whether Kalchinian entrapped this defendant into giving him some narcotics?" (R. 39). Agent Hunt was asked on cross-examination, "Did [agent] Melikian ever say to you 'We better see what kind of a fellow this Kalchinian is, to see whether he will frame people, induce people and violate the law unlawfully when they do not want to'?" (R. 45).

On the basis of defense counsel's opening statement and his cross-examination of government witnesses to develop the defense of entrapment, the government, as part of its case-in-chief, showed (over defense objections) that petitioner had been convicted of selling opium in 1942 and of possessing narcotics in 1946 (R. 136-138, 180, 187; Gov. Ex. 10, 11). Under the 1942 conviction, petitioner was sentenced to imprisonment for 18 months and a \$1.00 fine which was remitted (Gov. Ex. 10; R. 205-206). Under the 1946 conviction, he was given a suspended sentence, was placed on probation for two years subject to the condition that he surrender himself to the United States Public Health Service Hospital in Lexington, Kentucky, until cured of the drug habit; he entered this hospital on March 10, 1947 (Gov. Ex. 11; R. 206-208).

3. The court instructed the jury on the issue of entrapment in pertinent part as follows (R. 188-189):

The defendant in addition to his plea of not guilty has offered testimony by way of cross examination which, if believed by you, would constitute the defense of entrapment.

It is undoubtedly true that the creation by the Government employee of the opportunity or facility for the commission of a crime does not defeat the prosecution. Artifice and stratagem can be employed to catch those engaged in criminal enterprises. The appropriate object of this permitted activity is to reveal a criminal design, to expose illicit traffic and other offenses, and thus disclose would-be violators of the law.

But when the criminal design originates with Government officials or employees and they im-

plant in the mind of an innocent person the disposition to commit an alleged offense and induce its commission in order that they may prosecute, then in such an event a defendant cannot be found guilty but must be acquitted, and this is so because the defendant is entrapped into committing a crime, and that shocks public decency.

So in this case, concerning the defendant's contention that he was entrapped by the Government employees and hence not guilty of the crimes here charged, there are two questions of fact that you must decide:

1. Did Mr. Kalchinian, the Government special employee, induce the defendant to commit the offenses charged in the indictment?

2. If he did was the defendant ready and willing, without persuasion, and was he awaiting any propitious opportunity to commit the offenses?

On the first question; that is, the inducement, the defendant has the burden of proof. On the second question, the defendant's willingness or predisposition, the burden is on the Government.

And bear in mind that even if you believe that the defendant has been previously convicted of narcotics, the defendant may still have been induced and entrapped to commit the crime charged here. And if you find that to be so you must acquit the defendant despite his previous convictions.

In short, on this issue of entrapment, if you believe that the defendant was induced by Kalchinian to commit the offenses charged in the indictment, you must acquit unless you find

that the Government has sustained its burden of proving that the accused was ready and willing without persuasion, and was waiting for a propitious opportunity to commit the offense.

SUMMARY OF ARGUMENT

I

The evidence did not show entrapment as a matter of law, so as to warrant granting petitioner's motion for acquittal. Rather, the evidence permitted the inference that petitioner was ready and willing to commit the offense charged; and that the government's inducement merely provided the means for realization of his pre-existing purpose. The government informant was not the one who made the initial suggestion that petitioner *sell* or *furnish* narcotics. The informant merely asked that petitioner help him get to a source of supply, *i. e.*, give him a "contact." It was petitioner who undertook to do the supplying himself—and for a good price. This fact, together with the background of petitioner's prior convictions and the evidence of his well-organized plan, his readiness without urging to make frequent sales, and his high prices, support the conclusion of the jury that there was no entrapment. The evidence justified the finding that petitioner had, from the start, been a willing dealer in narcotics whose initial hesitancy in acceding to requests stemmed either from caution, or from the fact, which his statements suggested, that he was in the process of finding a new source of supply when the informant's first request was made.

On this evidence—coupled with the court's charge as to which no exception is taken—the issue was properly submitted to the jury. *Sorrells v. United States*, 287 U. S. 435, 451.

.II

A. Previous convictions for offenses similar in nature to that charged in an indictment are admissible in rebuttal to negative entrapment where the defendant raises the entrapment issue. The fact that petitioner did not raise this issue by his own defense evidence—he introduced no evidence at all—does not render the prior convictions inadmissible since petitioner's counsel unequivocally introduced the entrapment defense in his opening statement, and in his cross-examination of the government's witnesses.

Proof of prior convictions is admissible as part of the prosecution's case-in-chief where it is clear, as here, that the defense of entrapment will be invoked. Contrary to petitioner's argument, the introduction of his prior convictions did not compel him to take the stand and thus to furnish evidence in violation of his constitutional right against self-incrimination. When he chose to rely upon entrapment as his main issue, he simply assumed the risk that the Government would prove his prior convictions in order to negative that defense.

B. The previous convictions were not too remote to show the necessary criminal predisposition and design. The time interval between the previous convictions and the current offenses goes to the weight to be accorded by the jury to the convictions, not to their admissibility. Although the existence of a fairly sub

stantial period of time between prior offenses and the present one permits the inference that petitioner may have reformed, it also warrants the inference that he gained in cunning at concealing his activities as a result of his previous convictions, or that for part of the time he was unable to carry⁹ on illegal activities because of incarceration or hospitalization in the federal institution at Lexington. The choice of inferences was properly left to the jury for resolution.

ARGUMENT

I

THE ISSUE OF ENTRAPMENT WAS⁹ PROPERLY SUBMITTED TO THE JURY UNDER PROPER INSTRUCTIONS

As in *Masciale v. United States*, No. 84, this Term, the issue here is not what a court, sitting as a jury, might itself decide with relation to the evidence on entrapment. The issue is whether there was enough evidence from which a jury, faced with the task of resolving the issues presented by the evidence, could reasonably conclude that there had been no entrapment. In this case, while the evidence may be said to be subject to two possible interpretations, one sustaining and the other rejecting the defense of entrapment, the decision of the jury that the evidence established beyond a reasonable doubt that there had been no entrapment is fully supported by the record. The issue is purely one of fact, and the jury decided it on adequate evidence.¹

¹ Petitioner does not challenge the trial court's instructions (*supra*, pp. 8-10). See Pet. 1-2; Pet. Br. 14-20.

As discussed in more detail in our brief in No. 84, the basic issue with respect to entrapment is "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials". *Sorrells v. United States*, 287 U. S. 435, 451. It is not enough to make out the defense to show that the particular offense was committed at the instance of a government agent. If the evidence reveals "an existing course of similar criminal conduct; the accused's already formed design to commit the crime or similar crimes; [or] his willingness to do so, as evinced by ready complaisance", the inducement will not support the defense of entrapment. *United States v. Becker*, 62 F. 2d 1007, 1008 (C. A. 2).

This record contains sufficient evidence to go to the jury on this question of entrapment. The evidence does not even show that Kalchinian, the informant, made the initial suggestion that petitioner should *sell* or even *furnish* narcotics. The testimony of Kalchinian was that he asked petitioner if the latter could introduce him to a man from whom Kalchinian could get narcotics, *i. e.*, supply a "contact." It was *petitioner* who said that he would call Kalchinian when he was ready and who decided to make the sales himself. Only a very short interval of time elapsed between Kalchinian's initial requests during the latter part of August, 1951, and the inception of the regular illicit sales by petitioner in the first part of September. *Supra*, pp. 3-4. When he was ready to proceed, petitioner had a well-developed plan for clandestine

tine delivery. For a period of over two months, he furnished narcotics to Kalchinian with regularity and frequency, arranging for the continuous flow of sales without any special urging from Kalchinian. *Supra*, pp. 3-5. Petitioner's refusal from the start to mention any possible sources, his statement that his "man" was going out of business, his decision to call Kalchinian, his course of always making the sales himself, his well-organized plan for sale and delivery, his high prices, all justify the inference that he was not, as he suggests, a reformed character, led into evil by sympathy for a fellow-addict. Rather, particularly against his background as a prior dealer, this evidence suggests the activity of a narcotics seller, who had learned by experience to be careful but who was still ready and willing to make sales for profit when the opportunity arose.

The only facts that can be said to support the claim of entrapment are that petitioner met Kalchinian at a doctor's office and that he did not immediately sell him narcotics when first requested to furnish a "contact." As to the first point, petitioner's presence at the doctor's office is not necessarily proof that he was attempting to cure his own addiction and rehabilitate himself. It could as reasonably be inferred that he went to the doctor's office as a place where he would find potential customers. In any event, this fact does not account for the evidence that he himself chose to sell to Kalchinian, *on a continuing basis*, and not merely to help Kalchinian make a purchase or "contact." This is not a case of one or two acts of

assistance, but of a regular and frequent series of sales at a good price, over a two-month period.²

As for petitioner's slight hesitancy before supplying narcotics, the evidence suggests at least two possible explanations. Two prior convictions would obviously cause petitioner to be careful. The court below rightly observed that the jury was justified in regarding the rather slight hesitancy which petitioner did evince as "no more than prudent caution on the part of an experienced trafficker in narcotics" (R. 213). No narcotics dealer could hope to remain in business for any length of time were he to accept new and unknown customers with no hesitancy whatsoever, and it must be remembered that Kalchinian was a complete stranger to petitioner prior to August 1951. It is also possible that petitioner's statement to Kalchinian that his source had gone out of business (*supra*, p. 3) was true, and that petitioner had to find a new source before he himself could be back in business. This possibility tends to reinforce, rather than negate, the conclusion that petitioner was at all times willing to engage in the narcotics traffic. His hesitancy in acceding to the request may have been merely the result of temporary inability to engage in business.

² By way of contrast, see the fact situations in cases in which the evidence indicated that the defendant was merely assisting an addict, out of sympathy or friendship, to make a "contact" and obtain narcotics. *United States v. Sawyer*, 210 F. 2d 169 (C. A. 3); *United States v. Moses*, 220 F. 2d 166 (C. A. 3); *Adams v. United States*, 220 F. 2d 297 (C. A. 5).

The cardinal fact is that, after the initial delay, petitioner engaged in regular and frequent sales at high prices, pursuant to a well-planned arrangement. The jury was therefore justified in inferring that he was at all times a dealer engaged in the traffic for profit who welcomed Kalcinian as a customer when he was ready to supply that customer's needs.

Petitioner's predisposition to commit the offenses charged is also supported by the evidence of his two previous convictions for closely-related narcotics offenses. As long ago as 1942, he must have known that there was money to be made in the drug traffic and how to procure a supply, for his first conviction in that year evidences that he was in that business. Clearly he did not regard his first conviction as too high a price to pay, for in 1946 he was convicted of possessing narcotics. This is strong evidence that he had not changed his ways during the intervening period and was predisposed to commit the offenses charged in the present indictment.

II

PETITIONER'S PREVIOUS NARCOTICS CONVICTIONS WERE ADMISSIBLE AS PART OF THE GOVERNMENT'S CASE SINCE HIS COUNSEL, IN OPENING STATEMENT AND IN CROSS-EXAMINATION OF GOVERNMENT WITNESSES, HAD ALREADY INJECTED THE ENTRAPMENT DEFENSE.

A. It is not disputed that evidence of previous convictions for offenses similar in nature to that charged in an indictment is admissible in rebuttal in order to negative entrapment, where the defendant by his own evidence introduces that defense. Cf. *Carlton v.*

United States, 198 F. 2d 795 (C. A. 9); *Sherman v. United States*, 241 F. 2d 329, 332-333 (C. A. 9), certiorari denied, 354 U. S. 911; *United States v. Valdes*, 229 F. 2d 145, 147 (C. A. 2), certiorari denied, 350 U. S. 996.³ Petitioner argues that, despite this principle, the evidence was erroneously admitted in his case since he did not take the stand or raise the issue of entrapment by his own defense evidence.

Petitioner's counsel, however, unequivocally injected the entrapment defense into the case in his opening statement⁴ and in lengthy cross-examination of the government witness Kalchinian, and of agents Rudden and Hunt (see the Statement, *supra*

³ The same rule applies as to evidence of previous criminal activities in the narcotics field, as distinguished from convictions. *E. g.*, *Gilmore v. United States*, 228 F. 2d 121, 122 (C. A. 5); *United States v. DeMarie*, 226 F. 2d 783, 785 (C. A. 7), certiorari denied, 350 U. S. 966; *United States v. Johnson*, 208 F. 2d 404, 406 (C. A. 2), certiorari denied, 317 U. S. 928; *Cratty v. United States*, 163 F. 2d 844, 851 (C. A. D. C.); *Mitchell v. United States*, 143 F. 2d 953, 957 (C. A. 10); *Sivalbum v. United States*, 39 F. 2d 390, 393 (C. A. 8); *Saucin v. United States*, 31 F. 2d 732, 733 (C. A. 8); *Nutter v. United States*, 289 Fed. 484, 485 (C. A. 4).

⁴ Although an opening statement is admittedly not evidence, " * * * it is only fair to say that an opening statement should not have been made by counsel, if he did not expect to introduce evidence tending to substantiate it". *Lewis v. United States*, 11 F. 2d 745, 747 (C. A. 6); and see *People v. Stall*, 143 Cal. 682, 693-694; *State v. Olivieri*, 49 Nev. 75. While petitioner did not introduce evidence of entrapment as part of his own case—he did not produce any evidence at all—he did develop the issue in cross-examination of prosecution witnesses. Petitioner cannot contend that entrapment was not in the case for he argues at length in his petition for certiorari (Pet. 15-21) and in his brief here (pp. 14-20) that he has been entrapped. And that was the main issue in the Court of Appeals.

pp. 5-7). It is immaterial that the issue arose in that manner, rather than through petitioner's own testimony or that of defense witnesses. The important consideration is that the prosecution received the clearest of admonitions that the entrapment defense would be raised. That being so, the court below was correct in holding that "proof of prior convictions is admissible as part of the prosecution's case in chief where it is clear, as in the case before us, that the defense will be invoked" (R. 215). If the rule were otherwise, an accused by the simple expedient of mentioning the entrapment defense in his opening statement, expanding upon it through cross-examination of prosecution witnesses, and carefully refraining from raising the defense through his own evidence, could effectively prevent the prosecution from introducing evidence of his previous convictions of similar offenses, no matter how closely related to the crime charged. Justice to a defendant does not require such a restriction on relevant evidence.

Although technically not rebuttal evidence since not given in reply to defense evidence proper, the prosecution's introduction of petitioner's two previous convictions was nevertheless, viewed realistically, in the nature of rebuttal to negative the entrapment defense as developed by petitioner's counsel's cross-examination of the prosecution witnesses.⁵ The introduction of rebuttal evidence is a matter within the trial court's

⁵ The evidence of prior convictions was introduced at the close of the government's case, after the cross-examination of Kalchinian and the agents. See Pet. Br. 13-14.

sound discretion." In *Reece v. United States*, 131 F. 2d 186 (C. A. 5), certiorari denied, 318 U. S. 759, in which convictions for liquor law violations were affirmed, cross-examination of a disguised officer was such as to indicate that an entrapment defense would be raised. It was held (131 F. 2d at 188) that this "justified on redirect examination his testimony that he had disguised himself and undertaken to buy liquor in that vicinity by orders of his superiors in the Internal Revenue Department on information that numerous violations of the Revenue Laws were in progress there". So in the instant case, when cross-examination of prosecution witnesses disclosed a contention of entrapment, the government was properly permitted to introduce evidence negating this defense, in its case-in-chief. As this Court said in *Sorrells v. United States*, *supra*, 287 U. S. at 451-452, "if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense."

There was no violation of petitioner's rights under the Fifth Amendment. He was not compelled to give

⁶ *Goldsby v. United States*, 160 U. S. 70, 74; *United States v. Riccardi*, 174 F. 2d 883, 890 (C. A. 3), certiorari denied, 337 U. S. 941; *Williams v. United States*, 151 F. 2d 736, 737-738 (C. A. 4).

⁷ This is an entirely different situation from that involved in *Neill v. United States*, 225 F. 2d 174, 179-180 (C. A. 8), holding that it was error to permit the prosecution to introduce evidence tending to negative entrapment, where the defendant had never raised this defense but in effect had disclaimed it.

testimony or to execute any document in violation of his constitutional right against self-incrimination. When he chose to rely upon entrapment, he assumed the risk—as the *Sorrells* opinion holds—that the government would prove the convictions in an effort to disprove his defense. Petitioner was protected by the court's charge that the previous convictions had been offered by the government only to show his disposition or willingness to commit the offense in relation to the entrapment issue, and that “even though you may find [petitioner] may have been convicted for narcotics previously, you may not and cannot find [petitioner] guilty because of those previous convictions of narcotics” (R. 187-188).

B. The previous convictions were not too remote to show criminal predisposition and design (see Pet. Br. 23-25). In both *United States v. Valdes*, 229 F. 2d 145 (C. A. 2), and *Carlton v. United States*, 198 F. 2d 795 (C. A. 9) (*supra*, pp. 16-17), a period of approximately three years had elapsed between the last prior narcotics conviction and the current offense, and yet no question of remoteness was raised. In *Trice v. United States*, 241 F. 2d 513, 519 (C. A. 9), certiorari denied, 348 U. S. 900, hearsay information as to the accused's narcotics activity in 1943 and 1944 was held admissible as tending to prove predisposition, so as to negative the defense of entrapment as to offenses committed in 1952; the court was of the opinion that “it does not appear that the evidence was remote to the degree that it was an abuse of discretion for the court to receive it”. See also *Enriquez v. United States*, 198 F. 2d 313, 315, 316 (C. A. 9); *Mitchell v. United*

States, 213 F. 2d 951, 958 (C. A. 9), certiorari denied, 348 U. S. 912; *Kettenbach v. United States*, 202 Fed. 377, 383-384 (C. A. 9), certiorari denied, 229 U. S. 613.* Petitioner was sentenced to serve 18 months for the offense in 1942 (R. 205-206). He was not sentenced for the 1946 crime until 1947, and on that occasion was placed on two years' probation on condition that he enter the United States Public Health Hospital in Lexington, Kentucky, and stay there until cured of the drug habit. The judgment bears a certificate showing that petitioner did not enter the hospital until March 10, 1947 (R. 206-208). While incarcerated, the accused could not have engaged in the drug traffic as a regular business and these periods should certainly be excluded in determining the question of remoteness.

In any event, the time elapsing between the previous convictions and the current offense should go to the weight to be accorded by the jury to the convictions, not to their admissibility. Cf. *King v. United States*, 144 F. 2d 729, 732 (C. A. 8); *Wolstein v. United States*, 80 F. 2d 779, 780 (C. A. 8). The existence of a fairly substantial period of time between prior offenses and the present one permits the inference that petitioner may have reformed. But it also warrants the inference that he gained in cunning and adeptness at concealing his activities as a result of his previous activities and convictions. This choice of inferences was properly left to the jury for resolu-

* In *Caldwell v. United States*, 78 F. 2d 282 (C. A. 4), cited by petitioner (Pet. Br. 24), there was a 10-year interval between the prior conviction and the offense charged.

tion. Despite the lapse of time, the previous convictions disclose that petitioner was no novice in the narcotics trade and support the conclusion that he was predisposed to commit the current offenses.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

J. LEE RANKIN,

Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

BEATRICE ROSENBERG,

ROBERT G. MAYSACK,

Attorneys.

SEPTEMBER 1957.